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In The

Supreme Court of the United States

SHELDON PETERS WOLFCHILD, et al.,

Petitioners,

vs.

UNITED STATES,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A Court of Appeals for the Federal Circuit decision illuminates post-*Carcieri* conflicts with the Eighth Circuit, Ninth Circuit, the Federal Circuit itself and the Supreme Court regarding federal court subject matter jurisdiction over Indian claims of statutory violations against the United States. On the one hand, decisions such as *Carcieri v. Salazar*, ___ U.S. ___, 129 S.Ct. 1058 (Feb. 24, 2009) reflect that subject matter jurisdiction exists over federal government statutory violations on matters involving tribal governments recognized after the 1934 Indian Reorganization Act. *Carcieri* is in accord with Ninth Circuit decisions that an Indian tribe's sovereignty does not prevent the federal government from exercising superior federal sovereign powers. *United States v. Yakima Tribal Court*, 806 F.2d 853, 861 (9th Cir. 1986). On the other hand, the Federal Circuit and the Eighth Circuit deny federal court subject matter jurisdiction to enforce federal statutory obligations and legal rights to individual Native American beneficiaries when post-1934 IRA non-tribal community governments are involved. *Wolfchild v. United States*, 559 F.3d 1228 (Fed. Cir. 2009); *Smith v. Babbitt*, 100 F.3d 556 (8th Cir. 1996).

1. After *Carcieri*, whether federal court subject matter jurisdiction exists over Native American beneficiary claims of purported federal government violations of the 1934 IRA or other applicable federal statutes when post-1934 IRA non-tribal community governments are involved.

QUESTIONS PRESENTED – Continued

2. Whether the Federal Circuit's holding of "statutory use restrictions" in Congressional Appropriation Acts establishing statutory obligations on the United States, but no "trust," departs from applicable statutory interpretation and trust principles set forth in *United States v. Mitchell*, 463 U.S. 206 (1983) and its progeny.

3. Whether the Federal Circuit's holding that a 1980 Congressional Act terminated a trust impermissibly conflicts with the First Circuit's decision in *Passamaquoddy Tribe v. Morton*, 528 F.2d 370 (1st Cir. 1979) in that the Federal Circuit failed to consider the 1934 IRA's extension of all Native American trusts under 25 U.S.C. § 462 and failed to apply the "clear and unambiguous requirement" for a trust termination act.

LIST OF PARTIES

A list of parties has been provided to the Clerk of Court for the Supreme Court under a separate filing due to the numerous Petitioners represented (in excess of 10,790 individuals).

CORPORATE DISCLOSURE STATEMENT

The Petitioners are not and do not represent a nongovernmental corporation.

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully pray that a writ of certiorari issue to review the judgment below.

OPINION BELOW

The opinion of the United States Court of Appeals for the Federal Circuit, sitting as a three-judge panel, is reported at 559 F.3d 1228 (Fed. Cir. 2009) and is reprinted in the Appendix to the petition at Appendix 1. The court reversed and remanded the decision of the United States Court of Federal Claims reported at 62 Fed. Cl. 521 (2004) at Appendix 161.

JURISDICTION

The date of the Court of Appeals for the Federal Circuit decision was March 10, 2009 at Appendix 1.

A timely petition for rehearing and en banc review was denied on the following date: June 11, 2009. A copy of the order denying rehearing and en banc review appears at Appendix 112-15.

An extension of time to file the petition for a writ of certiorari was granted to and including November 6, 2009 on August 20, 2009, in Application No. 09A192.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent provisions of the 1888, 1889, and 1890 Appropriation Acts: Act of June 29, 1888, 25 Stat. 217 at 228; Act of Mar. 2, 1889, 25 Stat. 980 at 992; Act of Aug. 19, 1890, 26 Stat. 336 at 349. The Appropriation Acts are reprinted at Appendix 154-56. Relevant provisions of the original Indian Reorganization Act of 1934, as amended, 25 U.S.C. §§ 462, 463, 465, and 479 are reprinted at Appendix 159-60. The Act of Dec. 19, 1980, Pub. L. 9-557, 94 Stat. 3262 is reprinted at Appendix 157-58.

STATEMENT OF THE CASE

This petition places squarely before the Court several issues of national importance arising from a split in circuit court decisions. With the Federal Circuit's holding in *Wolfchild v. United States,*[1] this petition presents a confluence of conflicting court decisions from not only the United States Court of Appeals for the Federal Circuit, the Eighth Circuit, and Ninth Circuit,[2] but also with the Supreme Court.[3] In light of this Court's recent holding in *Carcieri v.*

[1] 559 F.3d 1228 (Fed. Cir. 2009), App. 1.

[2] U.S. Sup. Ct. Rule 10(a).

[3] U.S. Sup. Ct. Rule 10(c).

Salazar[4] and the circuit splits, the Federal Circuit's *Wolfchild* decision highlights an apparent fundamental legal and jurisdictional shift of federal court jurisdiction and Indian trust law.

First, the consequences of the Federal Circuit decision and resulting circuit splits dramatically change the legal framework in holding the United States accountable for legal violations and injustices regarding Native Americans. It places all Native Americans in the untenable position of losing federal court forums to litigate federal obligations to them and other statutory claims or abuses by post-1934 Indian Reorganization Act[5] communities. In short, if the purported governmental violations involve post-1934 IRA non-tribal community governments, when the lands are held in trust for those IRA communities, affected Native Americans have no federal court remedy.

Second, with the Federal Circuit's disregard of the Supreme Court's holding in *Carcieri*, the Circuit's decision affects Native American rights nationwide in matters involving federal holdings of trust lands. In the instant matter, the United States purchased lands and held them for the use of a statutorily-defined "band" of Native Americans – the 1886 Mdewakanton.

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[4] *Carcieri v. Salazar*, ___ U.S. ___, 129 S.Ct. 1058 (Feb. 24, 2009).

[5] Pub. L. 73-383, 48 Stat. 984 (1934) ("1934 IRA").

The United States later abrogated those obligations and now holds the same lands *in trust* to another group of Native Americans – Indian communities created after the passage of the 1934 IRA. Those post-1934 IRA non-tribal community governments exclude the original Congressionally-intended beneficiaries from any benefits to or derived from the lands held in trust for them. The Federal Circuit decision suggests – in contradiction of the IRA, 25 U.S.C. § 462 – that the Department of Interior does not need express statutory authorization before replacing Native American beneficiaries on Indian trust lands.

Third, both the Federal Circuit and the Eighth Circuit suggest that, if the United States' obligations to a definitive class of Native Americans affect present-day post-1934 IRA non-tribal community governments, the federal courts have no subject matter jurisdiction to adjudicate the federal claims of the affected class because of the "Indian sovereignty" of the post-1934 non-tribal community governments.

In this case, the benefits derived from lands appropriated for an identified band of 1886 Mdewakanton Indians and their descendants presently go only to members of post-1934 IRA non-tribal community governments – to the exclusion of all other 1886 Mdewakanton who Congress originally intended. The Federal Circuit and Eighth Circuit decisions, as applied, leave these excluded Native American beneficiaries with no judiciable remedy for statutory claims or violations under the 1934 IRA because of the lack of federal subject matter jurisdiction.

Fourth, the Federal Circuit and Eighth Circuit suggest a judicial reluctance to assert subject matter jurisdiction, despite claims solely against the United States, if the judgment would require some redistribution of wealth of post-1934 IRA non-tribal communities to include the Congressionally-intended beneficiary class. To the contrary, federal courts should not rely on purported "Indian sovereignty" of post-1934 IRA non-tribal community governments to judicially excuse the United States from complying with and enforcing all applicable federal laws.

After *Carcieri*, do federal courts have subject matter jurisdiction over Indian claims against the United States for violations of the IRA, Congressional Acts, and other applicable federal statutes when post-1934 IRA non-tribal community governments are involved? *Carcieri* suggests the federal courts have such subject matter jurisdiction. The Eighth Circuit decision in *Smith v. Babbitt*[6] states the opposite. The Federal Circuit decision appears to fall in line with *Smith v. Babbitt*. But, the Ninth Circuit in two different types of cases, *United States v. Yakima Tribal Court*[7] and *United States v. White Mountain Apache Tribe*,[8] have found subject matter jurisdiction to enforce federal statutory obligations involving Native American tribes.

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[6] *Smith v. Babbitt*, 100 F.3d 556 (8th Cir. 1996), *cert. denied sub nom., Freezor v. Babbitt*, 522 U.S. 807 (1997).

[7] 806 F.2d 853, 861 (9th Cir. 1986).

[8] 784 F.2d 917, 919 (9th Cir. 1986).

The Federal Circuit found, for the first time ever, Native American non-trust "statutory use restrictions" as possible substantive rights, but without providing a legal forum for adjudication as applied when post-1934 IRA non-tribal community governments are involved.

Fifth, the Federal Circuit's decision renounced settled principles of statutory interpretation governing Indian trust law creation. The Circuit required Congressional Acts to include explicit words such as "trust" or "reservation" to create trust obligations. The Federal Circuit's decision has now created a new restriction on Congress' ability to create trusts not acknowledged by this Court.

Sixth, the Federal Circuit also rejected settled principles of statutory interpretation governing Indian trust law termination. The court did not properly apply the Plain Meaning Rule to a Congressional Act passed in 1980, construing it as a trust termination Act. The Act did not contain the words expressing a purpose to terminate Indian trust beneficiary rights. The Federal Circuit decision did not consider and apply provisions of the IRA, specifically 25 U.S.C. § 462, which continues the terms of all Indian trusts in perpetuity unless Congress "directs" otherwise.

The Federal Circuit did not apply the "plain and unambiguous" requirement followed by the First Circuit when determining whether a Congressional Act terminates an Indian trust. In light of the Federal Circuit's decision, what statutory interpretative

principles now apply to interpreting Congressional acts purporting to terminate Indian trust beneficiary rights?

Finally, with the Federal Circuit's demand that Congressional Acts have specific language such as "trust" or "reservation" to create trust obligations between Native Americans or Native American tribes and the United States, has the statutory interpretative principles of the Supreme Court been eviscerated, undermined, or modified beyond *Mitchell II*[9] and its progeny, including this Court's most recent pronouncement under *Navajo II*?[10]

The implications of the doctrinal shift by the Federal Circuit's decision are far reaching. The federal jurisdictional conundrum for Native Americans, and the Circuit's restrictive framework and misapplication of Indian trust law interpretation represents the need for a definitive resolution by this Court.

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[9] *United States v. Mitchell*, 463 U.S. 206 (1983) ("*Mitchell II*").

[10] *United States v. Navajo Nation*, ___ U.S. ___, 129 S.Ct. 1547, 1552 (Apr. 6, 2009) ("*Navajo II*").

A. The Underlying Facts[11]

1. An Indian conflict resulted in harsh Congressional reaction, but to those who remained loyal to the United States, promises of land.

After an 1862 Sioux uprising in Minnesota, Congress in 1863 passed an Act that "abrogated and annulled" all treaties between the federal government and Minnesota Sioux Indians and "forfeited to the United States" " . . . all lands and rights of occupancy within the State of Minnesota. . . ."[12] The federal government removed all Sioux from Minnesota with the exception of about 200 Mdewakanton Sioux who helped rescue whites during the 1862 uprising.

The reward for rescuing whites included "eighty acres in severalty to each individual of the beforenamed bands who exerted himself in rescuing whites from the late massacre of said Indians [as] an inheritance to said Indians and their heirs forever." The 80-acre parcels described in the 1863 Act were never set aside and the 200 or so loyal Mdewakanton remained without land in Minnesota for 25 years.

Finally, through Appropriation Acts in 1888, 1889, and 1890 ("Appropriation Acts"), Congress

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[11] The trial court's opinions contain a thorough canvass of the complex factual and legal background of this case. *See Wolfchild I,* 62 Fed. Cl. at 526-35, App. 161 and *Wolfchild v. United States,* 68 Fed. Cl. 779, 782-83, 785-94 (2005) ("*Wolfchild II*").

[12] Act of Feb. 16, 1863, 12 Stat. 652.

authorized the Secretary of the Interior to purchase land and other needed items for the loyal Mdewakanton in such a manner as the Secretary deemed best and to ensure that each Indian beneficiary receive "an equal amount in the value of the appropriation":

> [. . .] thousand dollars, to be expended by the Secretary of the Interior as follows . . . And all of said money which is to be expended for lands . . . shall be so expended that each of the Indians in this paragraph shall receive, as nearly as practicable, an equal amount in the value of the appropriation.[13]

Interior used $15,529.22 of the $40,000.00 of appropriated moneys to purchase "lands" in Minnesota – "the 1886 lands."[14]

The lands are acknowledged by all parties to be currently *held in trust* by the United States.

The Acts identified the Mdewakanton Indians for whom "each Indian" would receive the benefit of the land purchased as the 1886 Mdewakanton:

> For the support of the full and mixed blood Indians in Minnesota heretofore belonging to the Medawakanton (sic) band of Sioux Indians, who have resided in said State since

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[13] App. 154-55.

[14] The appropriated lands are "commonly called the '1886 lands' to reflect the effective date of the census that defined the beneficiaries." *Wolfchild I*, 62 Fed. Cl. at 528, App. 179.

> the twentieth day of May, eighteen hundred and eighty-six, or who were engaged in removing to said State, and have since resided therein, and have severed their tribal relations . . . as may be deemed best for these Indians or family thereof . . . [15]

A May 20, 1886 census published in September 1886 (prior to enactment of the Appropriation Acts), later supplemented in 1889, identified the Mdewakanton beneficiaries of the Appropriation Acts. The U.S. Court of Federal Claims found the 1886 census as the "presumptive starting point for indentifying the loyal Mdewakanton and their descendants"[16] – the "1886 Mdewakanton."

Interior purchased the 1886 lands in three different Minnesota locations and implemented a land assignment system for individual 1886 Mdewakanton. The assignments, made through land certificates, stated the 1886 lands as "held in trust by the Secretary of the Interior for the exclusive use and benefit of said Indian . . . [and] subject to [re]assignment by the Secretary of the Interior to some other Indian who was a resident of Minnesota on May 20, 1886 or a

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[15] App. 155; Act of Aug. 19, 1890, ch. 807, 26 Stat. 336 at 349. The two previous Appropriation Acts, used the same date of May 20, 1886, but the language to identify the 1886 Mdewakanton differed slightly: The 1888 and 1889 Acts identified the Mdewakanton as "full-blood." Act of June 29, 1888, ch. 503, 25 Stat. 217 at 228; Act of Mar. 2, 1889, ch. 412, 25 Stat. 980 at 992, App. 154-55.

[16] *Wolfchild II*, 68 Fed. Cl. at 787 n. 10.

legal descendant of such resident Indian."[17] Interior's land assignment system remained essentially in place for approximately 90 years until 1980 – being often referred to by Interior as an implementation of its "trust" obligations to the 1886 Mdewakanton.[18]

2. The 1934 IRA Preserved 1886 Mdewakanton Rights and Allowed the Creation of Post-1934 IRA Non-tribal Community Governments, But the Communities' Constitutions Subsequently Jeopardized 1886 Mdewakanton Rights to 1886 Lands.

(a) The 1936 post-1934 IRA non-tribal community governments.

When Congress enacted the Indian Reorganization Act in 1934, it preserved "existing periods of trust placed upon any Indian lands . . . until otherwise directed by Congress."[19] The IRA further provided that if the Secretary restores surplus lands to "tribal ownership" the pre-existing "rights or claims of any persons to [such] lands . . . shall not be affected by this Act."[20] Recognizing an opportunity, 1886 Mdewakanton leaders sought to bring all 1886 Mdewakanton under one political government, despite the

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[17] *E.g.*, JA2011 ("JA" refers to Federal Circuit joint appendix submissions).

[18] *Wolfchild*, 559 F.3d at 1248, App. 45.

[19] 25 U.S.C. § 462.

[20] 25 U.S.C. § 463.

fact the Secretary of the Interior purchased the 1886 lands in three separate Minnesota locations.

Interior denied the suggested governance as impractical resulting in the creation of three separate non-tribal political governmental entities, two in 1936, and one in 1969 – the Prairie Island Indian Community (1936), the Lower Sioux Indian Community (1936), and the Shakopee Mdewakanton Sioux Community (1969) (the "Communities"). "Non-tribal" refers to the fact that the Mdewakanton could not be recognized as a "historical tribe" due to both 1863 Act and Appropriation Acts' requirements to sever tribal relations.[21]

IRA provisions, however, allowed non-tribal Native Americans to form political governments based on "residence on reservation land."[22] Here, the territorial provisions of the Lower Sioux and Prairie Island Constitutions find the 1886 lands, reserved for the exclusive use of the 1886 Mdewakanton, as the Communities' original land base.

Interior guided, drafted, and approved the Communities' constitutions' content. The two 1936 constitutions followed the IRA "trust" directives. The 1969 constitution did not.

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[21] App. 117-19; JA4656; JA4659-60.

[22] 25 U.S.C. § 476 (prior to amendments in Pub. L. 100-581, Stat. 2938-39 (1988) which contained relevant savings clause at § 103).

For instance, the 1936 community constitutions incorporated and continued Interior's land assignment system preserving the 1886 Mdewakanton descendants' right to "receive an equal amount in the value of" as the Appropriation Acts directed:

- "Nothing . . . [would]be construed to deprive any Minnesota Mdewakanton Sioux of any vested right;"[23]
- That land assignments be made only to "the Mdewakanton Sioux residing in the State of Minnesota on May 20, 1886, and their descendants"[24] whether residents or not within the geographic political boundaries of each Community;[25]

As highlighted by the Federal Circuit, an Interior Solicitor's 1974 opinion letter concluded that the 1886 lands were best viewed held by the United States in trust for 1886 Mdewakanton, with Interior's Secretary "possessing a special power of appointment among members of a definite class" and with the authority to grant an interest in the form of either a tenancy at will or a defeasible interest in the land.[26]

A 1978 Interior memorandum confirmed the 1886 Mdewakanton descendants as beneficiaries of the

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[23] JA1952-57; JA1989-97.

[24] JA1955; JA1995.

[25] *Id.* Act of Mar. 2, 1889, 25 Stat. at 992, and Act of Aug. 19, 1890, 26 Stat. at 349, App. 155.

[26] *Wolfchild*, 559 F.3d at 1248, App. 46.

1886 lands, not the post-1934 IRA non-tribal community governments:

> It should be stressed that none of the three Community governments, organized under the Indian Reorganization Act and operating under Constitution and bylaws, has any right, title or interest in these lands. The land is held for the benefit of a specific class of people and their descendants.[27]

(b) The 1969 post-1934 non-tribal IRA community.

In 1969, the Department of the Interior, at the center of organizing the Shakopee Community, allowed for the Community's malformation through the acceptance of both 1886 Mdewakanton and non-1886 Mdewakanton as charter and community members. Interior accepted the status of the non-1886 Mdewakanton, knowing the land base for the Community rested entirely on 1886 lands – lands that were for the exclusive use of 1886 Mdewakanton and their descendents. Consequently, the Shakopee constitution would have no provisions to protect the rights of the 1886 Mdewakanton and their descendants' rights to 1886 lands.

Eventually, all *three* Communities closed membership to other 1886 Mdewakanton depriving them

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[27] JA399-400.

of receiving acquired benefits derived from the 1886 and other acquired lands.

Ironically, but for the 1886 Mdewakantons previously awarded lands and use thereof through the Appropriation Acts, and the subsequent 90-year Interior governance over land use to those people, the now recognized post-1934 IRA non-tribal community governments would not exist. Yet, over 90% of the original 1886 Mdewakanton Congressionally-intended beneficiaries are now excluded by the Communities because Interior refuses to comply with its statutory obligations under the Appropriation Acts.

3. The United States holds lands in trust for the post-1934 IRA non-tribal Communities.

In 1980, Congress passed an act requiring all right, title and interest in the United States in lands "which were acquired and are now held by the United States for the use or benefit of certain Mdewakanton Sioux Indians under the [Appropriations Acts], are hereby declared to hereafter *be held by the United States . . . in trust* for the [Communities]."[28]

After enactment of the 1980 Act, Interior stopped making land assignments to 1886 Mdewakanton. Simultaneously, the Communities excluded from

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[28] Pub. L. 9-557, 94 Stat. 3262 (1980) (emphasis added), App. 157.

membership and from the benefits derived from the 1886 lands,[29] all 1886 Mdewakanton who were not already community members. Thus, although the United States appropriated the 1886 lands for 1886 Mdewakanton for their use and benefit (now numbering over 10,700 people) the United States holds the lands in trust for three communities of about 5% of the intended beneficiaries who now exclusively receive all benefits from the 1886 lands. Adding insult to injury, the 1886 land benefits also go to non-1886 Mdewakanton whom Interior permits to be Community members.

Even Interior has asserted the illegitimacy of non-1886 Mdewakanton being members of the community governments and voting.[30] Despite Interior's stated knowledge of non-1886 Mdewakanton being impermissibly on 1886 Lands, Interior has done nothing in the last 12 years to remove the non-1886 Mdewakanton from the 1886 Lands.

The *Wolfchild* litigation is a result of Interior's intentional policies and actions.

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[29] As reported in 1976, Interior holds moneys derived from 1886 lands in an Interior trust account for eventual distribution to the 1886 Mdewakanton. The Federal Circuit remanded the case for further proceedings on that claim. App. 74-75.

[30] *See Shakopee Mdewakanton Sioux (Dakota) Community v. Babbitt*, 107 F.3d 667, 669-70 (8th Cir. 1997).

B. The U.S. Court of Federal Claims Proceedings

In *Wolfchild I*, the trial court finds Congressional Appropriation Acts created a trust and that the United States breached that trust.

In November 2003, the petitioners, the 1886 Mdewakanton lineal descendants, filed an action under the Tucker Act and Indian Tucker Act in the U.S. Court of Federal Claims. The petitioners alleged, in part, that the Appropriations Acts created a trust and that the government breached its fiduciary duties to them. The government moved to dismiss the complaint for lack of jurisdiction, asserting that the Appropriations Acts did not create money-mandating fiduciary duties, and even if they did, the post-1934 IRA non-tribal community governments had sovereign power to determine membership and benefits notwithstanding the Appropriation Acts and IRA. The Petitioners filed a cross-motion for partial summary judgment.

In 2004, the U.S. Court of Federal Claims denied the United States' motion to dismiss and granted the Petitioners' motion for partial summary judgment that the Appropriations Acts created a trust for the benefit of the 1886 Mdewakanton and that the United States breached that trust.[31] Relying upon *White*

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[31] *Wolfchild I*, 62 Fed. Cl. at 526-35, App. 166-93.

Mountain Apache,[32] the court concluded that the "agreement between the loyal Mdewakanton and the government includes all the features of a trust."[33] The Court further found an Interior "uniformly consistent practice"[34] over 90 years reinforced the view that Mdewakanton residents in Minnesota or in the actual process of moving to Minnesota on May 20, 1886, and their descendants, are trust beneficiaries to lands acquired under the Appropriation Acts.[35]

The lower court also found the passage of a 1980 Act in which the government held lands in trust for the Communities merely gave greater control over the use of the lands and eliminated two classes of members established by the Communities' constitutions. The Court concluded the 1980 Act did not terminate the created trust: "[t]he 1980 Act does not state as its purpose that the trust for the Mdewakanton would be terminated."[36]

The government subsequently moved for reconsideration – later denied. The court in *Wolfchild II* affirmed its previous decision[37] noting "the government would [rather] introduce an element of confusion and

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[32] *White Mountain Apache,* 537 U.S. 465, 476 n. 3 (2003).

[33] *Wolfchild I,* 62 Fed. Cl. at 540-41, App. 206-07.

[34] *Id.* at 542, App. 214.

[35] *Id.*

[36] *Id.* at 543, App. 215-16.

[37] *Wolfchild II* at 794.

obfuscation where there was none in the contemporaneous actions of the Department [of the Interior]."[38]

Nevertheless, in 2007, the U.S. Court of Federal Claims granted the United States' motion for certification for interlocutory appeal on two issues:

> (1) Whether a trust was created in connection with and as a consequence of the 1888, 1889, and 1890 Appropriations Acts for the benefit of the loyal Mdewakanton and their lineal descendants, which trust included land, improvements to land, and monies as the corpus; and
>
> (2) If the Appropriations Acts created such a trust, whether Congress terminated that trust with enactment of the 1980 Act.[39]

C. Proceedings on Appeal

The Federal Circuit reverses the lower court.

The Federal Circuit, permitting the interlocutory appeal under 28 U.S.C. § 1292, reversed the lower court's decision and remanded for further proceedings. Without reference to U.S. Supreme Court Indian trust law doctrine, the Federal Circuit did not find

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[38] *Id.* at 787.

[39] *Wolfchild v. United States*, 78 Fed. Cl. 472, 480 (2007), App. 96.

the Appropriation Acts creating a "trust" per se, but "merely appropriating funds subject to a 'statutory use restriction.'"[40] The Circuit concluded that "even if we construed the Appropriation Acts as creating a trust relationship by implication or by operation of law, we would hold that the 1980 Act terminated that trust."[41]

The Federal Circuit described the 1980 Act as one that "simply provides for the long term disposition of the property purchased pursuant to the Appropriation Acts, an issue left unresolved by Congress both in those Acts and during the ensuing 90 years."[42] But, the Circuit dismissed the United States Supreme Court's limitation of the federal government's trust authority under the IRA's § 465 in *Carcieri* "to those members of tribes that were under federal jurisdiction at the time the IRA was enacted"[43] – disregarding the Petitioners' argument to *Carcieri*'s relevancy to the issues then before the Federal Circuit.[44]

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[40] *Wolfchild*, 559 F.3d at 1240, App. 27.

[41] *Id.* at 1257, App. 68.

[42] *Id.* at 1258 n. 13, App. 70.

[43] *Carcieri*, 129 S.Ct. at 1065.

[44] *Wolfchild*, 559 F.3d at 1251 n. 8, App. 53.

REASONS FOR GRANTING THE PETITION

I. The Federal Circuit's "Statutory Use Restriction" Derived from Appropriation Acts Creates a Substantive Enforceable Right, But Without a Legal Forum for Adjudication, Contrary to *Carcieri* and Ninth Circuit Decisions That Provide For Subject Matter Jurisdiction.

In the Federal Circuit's analysis of the first certified question before it – whether the 1888, 1889, and 1890 Appropriation Acts created a trust – the court added to the Supreme Court lexicon of trust law, a new sub-category – "statutory use restriction." Simultaneously, the Circuit held that the Appropriation Acts did not create a trust because the words "trust"[45] or "reservation" were not in the statutory text[46] – thereby avoiding *Mitchell I* and its progeny:

> "[w]hile the legal issue [regarding whether Congress created a trust] is complex and untangling the historical materials is difficult, we conclude that the [1888, 1889, and 1890] Appropriation Acts are best interpreted as merely appropriating funds subject to a statutory use restriction. . . ."[47]

The Circuit's decision means that Interior has apparent fiduciary obligations to the 1886 Mdewakanton

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[45] *Id.* at 1238, App. 20-21.

[46] *Id.* at 1253, App. 58-59.

[47] *Id.* at 1240, App. 27.

as to the statutory use restriction on the 1886 Lands, and thus any deprivation of benefits related to those lands vis-à-vis the Communities. But, the court refused to provide the petitioners with a legal forum for its legal arguments due to an apparent lack of subject matter jurisdiction. The Circuit's decision suggests that a Congressional 1980 Act[48] extinguished all of Petitioners' rights because the United States now holds the 1886 lands in trust exclusively for the post-1934 IRA non-tribal community governments.

Similarly, an Eighth Circuit decision in *Smith v. Babbitt*[49] found 1886 Mdewakanton descendants jurisdictionally barred from pursuing statutory remedies in federal court against the United States:

> Careful examination of the complaints and the record reveals that this action is an attempt by the plaintiffs to appeal the Tribe's membership determinations. It is true that appellants allege violations of IGRA, ICRA, IRA, RICO, and the Tribe's Constitution. However, upon closer examination, we find that these allegations are merely attempts to move this dispute, over which this court would not otherwise have jurisdiction, into federal court.[50]

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[48] App. 157.

[49] 100 F.3d 556 (8th Cir. 1996).

[50] *Smith*, 100 F.3d at 559.

Because the Eighth Circuit decision conflated community political membership issues with claims of breached federal statutory obligations, the affected 1886 Mdewakanton were jurisdictionally barred from pursuing claims against Interior in the U.S. District Court to enforce statutory rights of beneficial interests derived from 1886 lands held in trust by the United States.

Meanwhile, the Federal Circuit's "statutory use restriction" means Interior has apparent fiduciary obligations to ensure benefits, which heretofore have gone to the Communities, now must go exclusively to 1886 Mdewakanton descendants. The Circuit, for instance, found Interior "recognized, of course, that Congress intended the 1886 Mdewakanton to be the specific beneficiaries of the Appropriation Acts . . . [and] . . . adopted a policy designed to promote Congress's intent by assigning lands to individuals from within the group of 1886 Mdewakantons and subsequently to individuals from within the class of the descendants of those Mdewakanton."[51]

The Federal Circuit further acknowledged Interior's role in fulfilling its obligation to the 1886 Mdewakanton: "[c]ontemporaneous documents make clear that the Secretary of the Interior considered himself bound by the terms of the statutes to reserve the usage of the 1886 lands . . . [and] held the property for the use and benefit of individuals

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[51] *Wolfchild*, 559 F.3d at 1243, App. 33.

selected from a defined class."[52] But the Circuit, without analysis to Supreme Court precedent of trust principles in *Mitchell* and its progeny,[53] later explained that: "[c]onsistent with the principle that there is a 'general trust relationship between the United States and the Indian people' . . . Interior Department officials often characterized the 1886 lands as being held in trust for the 1886 Mdewakantons and their descendants, even though they were not a tribe of Indians, but rather were viewed as a group of individuals who had severed their tribal relations and were in need of assistance."[54]

The Federal Circuit recognized cognizable and enforceable fiduciary obligations under the Appropriation Acts to allow the pursuit of remedies in the federal courts against the United States for violating those duties. But, like the Eighth Circuit, the Circuit found that if Interior's obligations to a definitive class of Indians affect present-day post-1934 IRA non-tribal community governments, the federal courts have no subject matter jurisdiction to adjudicate the affected beneficiary class's claims.

In other words, since the benefits derived from the 1886 lands presently go to only members of the post-1934 IRA non-tribal community governments, to the exclusion of all others who Congress intended, the

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[52] *Id.* at 1243, App. 33.

[53] *Mitchell II*, 463 U.S. at 225.

[54] *Wolfchild*, 559 F.3d at 1248, App. 45.

excluded Indians have no judicable remedy because of the lack of federal subject matter jurisdiction.

On the other hand, the Ninth Circuit recognizes that when federal obligations are to be enforced, there exists federal subject matter jurisdiction. In *United States v. Yakima Tribal Court*[55] and *United States v. White Mountain Apache*,[56] the Ninth Circuit held that United States sovereignty – including federal court subject matter jurisdiction – overrides tribal sovereignty in matters involving federal statutory obligations. Therefore, if the Appropriation Acts create a federal obligation, the Petitioners are entitled to subject matter jurisdiction to adjudicate their claims against the United States even though the claims may implicate benefits from lands held in trust by the government for post-1934 IRA non-tribal community governments.

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[55] 806 F.2d 853 (9th Cir. 1986)

[56] 784 F.2d 917 (9th Cir. 1986).

II. The United States Initially Enforced Its Obligations to Individual 1886 Mdewakanton, But Later Abandoned Those Obligations in Lieu of Post-1934 IRA Communities and Excluded 1886 Mdewakanton From Benefits Derived From the 1886 Lands.

The IRA[57] was intended to standardize a process for historical land-owning tribes to formally organize federally-recognized governments. But, the 1886 Mdewakanton were not a "historical tribe" because of the 1863 Act's renouncement of the Mdewakanton as a tribe and the Appropriation Acts' requirement for severance of tribal relations. Thus, the 1886 Mdewakanton "were not privileged to organize as a tribe over various reservations. . . ."[58] However, under IRA, §§ 16 and 19, an additional process existed for a non-tribal group of Indians such as the 1886 Mdewakanton descendants to organize a government based on "residence on reservation land."[59]

Thus, the only basis of the 1886 Mdewakanton forming a political organization lay with the 1886 Mdewakanton "residing on reservation land" – which, in turn, rested on the 1886 Mdewakanton's legal rights to the 1886 lands. Hence, the names of the

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[57] Pub. L. 73-383, 48 Stat. 984 (1934) ("1934 IRA").

[58] JA4656; JA4659-60.

[59] 25 U.S.C. § 476 (prior to amendments in Pub. L. 100-581, Stat. 2938-39 (1988) which contained relevant savings clause at § 103).

organizations are "communities" – reflecting they are something less than historical land-owning tribes.[60]

Accordingly, in 1936, Interior recognized the Lower Sioux Indian Community and the Prairie Island Indian Community. These communities, however, did not have traditional tribal powers of assigning reservation land, condemning member's land or regulating the inheritance of land.[61] Further, the Lower Sioux and Prairie Island constitutions incorporated Interior's 1886 land assignment system to ensure the 1886 lands exclusively benefited the 1886 Mdewakanton:[62]

> The land within the territory of the Lower Sioux Community which was purchased by the United States for the Mdewakanton Sioux residing in the State of Minnesota on May 20, 1886, and their descendants, may be assigned to any Minnesota Mdewakanton Sioux entitled thereto. . . .[63]

Interior, not Lower Sioux or Prairie Island, determined who would benefit from the 1886 lands and reside in the respective communities.

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[60] *See* Felix Cohen, *Basic Memorandum on the Drafting of Tribal Constitutions* 5 (David E. Wilkins, ed., Univ. of Okla. Press 2006).

[61] JA4660; JA1952; JA1990.

[62] JA1952; JA1990; JA4660.

[63] App. 129.

In 1969, 35 years after the enactment of the 1934 IRA, Interior again played *the* major role in the Shakopee Mdewakanton Sioux Community's constitution's adoption. Interior approved the Shakopee Constitution despite the absence of 1934 IRA prescriptions to preserve existing United States' obligations and trusts to a recognized band of Indians – the 1886 Mdewakanton. Among 1886 Mdewakanton who chartered the Shakopee Community and Constitution and became members were non-1886 Mdewakanton.

The Shakopee Constitution was diametrically opposite to the Prairie Island and Lower Sioux Communities' constitutions regarding membership, and, significantly, regarding the preservation of 1886 lands for the 1886 Mdewakanton. For years afterward, Interior reviewed land assignments at Shakopee and insisted on proof of lineal descendency of 1886 Mdewakanton; but, from the start, land assignments were controversial and difficult for Interior's Bureau of Indian Affairs regional office to manage:

> Land assignments on 1886 Mdewakanton lands will be issued only to persons who can prove descendency from the 1886 Mdewakanton residents . . . However, no action will be taken at this time to cancel or disturb any existing assignments as a result of this policy statement.[64]

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[64] JA04719.

By the time of the 1980 Act's passage, in which the United States would then hold 1886 lands in trust for the three communities, Interior was well aware of the need to verify the 1886 descendancy for land assignments. Interior instead supported a policy that left the land assignments to the three post-1934 non-tribal community governments whose membership had been corrupted by the actions of Interior. Interior allowed land and the benefits derived from the 1886 Lands to be shared among those without 1886 Mdewakanton descendancy.

The United States knew of and approved the indiscretion of Shakopee to allow non-1886 Mdewakanton to enjoy benefits of and derived from the 1886 lands to the exclusion of others. Interior's complicity is affirmed in 1983: "[T]he [1983] Enrollment Ordinance contains the name of 33 individuals . . . These individuals are to be considered members of the Shakopee Mdewakanton Sioux Community regardless of their blood degree."[65]

Thus, Interior allowed and affirmed its approval of the inclusion of *non-lineal* Mdewakanton among lineal descendants of 1886 Mdewakanton.[66]

With Interior's complicity and approval, Communities' policies led to the complete exclusion of 1886 Mdewakanton denying them any benefits to or from

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[65] JA04747.

[66] *See also, Babbitt*, 107 F.3d at 669-70.

1886 lands. By 1988, Shakopee closed its membership to the current members including the non-1886 Mdewakanton. Prairie Island and Lower Sioux followed Shakopee's example.

In conjunction with Interior's complicity, the Shakopee Community Court, created in about 1988, while admitting to genealogical controversies, it refused to assert jurisdiction to exclude the non-1886 Mdewakanton or to include the 1886 Mdewakanton:

> Suffice it to say that the files of the federal courts and federal agencies . . . are littered with records of disputes which had, at their base, understandable desires on the part of some to participate in the Community's resources, justifiable fears that such participation would be denied by others, and profound doubts that there was any forum which had jurisdiction to respond.[67]

Thus, even the Shakopee Community Court is in accord with the Federal Circuit and Eighth Circuit decisions denying Petitioners' jurisdiction to enforce federal obligations over 1886 lands. But, under *Carcieri* and the Ninth Circuit decisions, federal court subject matter jurisdiction exists over claims of statutory violations by Interior – presumably even those involving a post-1934 Act non-tribal community government.

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[67] *Ross v. SMS(D)C*, 1 Shak. 86, 87 (July 17, 1992), App. 144.

This Court should consider, after *Carcieri*, that federal courts have subject matter jurisdiction to hear Indian statutory violation claims against the United States. The Eighth Circuit decision in *Smith v. Babbitt* – and now the Federal Circuit decision – have raised substantial doubts if federal court subject matter jurisdiction exists.

III. The Federal Circuit's Statutory Interpretation of the Appropriation Acts Contradicts Supreme Court Precedent in *Mitchell I, Mitchell II, White Mountain Apache, Navajo I, Navajo II* and *Carcieri*.

The Federal Circuit reversed the trial court on the first certified question regarding the Appropriation Acts imposing a statutory duty on the Secretary of Interior regarding Mdewakanton beneficiaries:

> [. . .] And all of said money which is to be expended for lands [by the Interior Secretary] . . . shall be so expended that each of the Indians in this paragraph shall receive, as nearly as practicable, an equal amount in the value of the appropriation.[68]

Lands were purchased under the Appropriation Acts that are currently held in trust by the United States. The Federal Circuit denied the Appropriation Acts created a "trust" and in its stead adopted a "statutory use restriction" as a substitute to statutory

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[68] App. 154-55.

interpretative analysis regarding the application of Indian trust law – all in direct conflict with Supreme Court precedent regarding statutory interpretation.

The Federal Circuit provided a one-sentence, forty-two word textual analysis to shift the legal framework in determining the legal responsibilities and liabilities between the federal government and Native Americans:

> That clause, which the record materials suggest was added because of complaints that the funds from an earlier appropriation were disproportionately distributed, provides such minimal direction that it is plainly insufficient to convert what would otherwise be an appropriation into a trust.[69]

The Federal Circuit's one-sentence analysis violated Supreme Court statutory interpretative principles governing Native American trust cases:

- The "Substantive Source of Law" doctrine ("*Navajo I*")[70] and ("*Navajo II*");
- the "Plain Meaning Rule" (*Carcieri*);
- "The Word 'Trust' In the Law Is Not Necessary to Create an Indian Trust" doctrine ("*Mitchell I*") and ("*Mitchell II*"); and

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[69] *Wolfchild*, 559 F.3d at 1239, App. 24.

[70] *United States v. Navajo Nation*, 537 U.S. 488 (2003).

- The Fair Inference Rule of *Mitchell II* (also applied in *United States v. White Mountain Apache.*)[71]

First, the Federal Circuit's decision contradicts with the principles of statutory construction expressed in *Navajo II:*

> In *Navajo I*, we reiterated that the analysis must begin with "specific rights-creating or duty-imposing statutory or regulatory prescriptions." 537 U.S., at 506, 123 S.Ct. 1079. If a plaintiff identifies such a prescription, and if that prescription bears the hallmarks of a "conventional fiduciary relationship," *White Mountain,* 537 U.S., at 473, 123 S.Ct. 1126, then trust principles (including any such principles premised on "control") could play a role in "inferring that the trust obligation [is] enforceable by damages," *id.*, at 477, 123 S.Ct. 1126. But that must be the second step of the analysis, not the starting point.[72]

The Federal Circuit found a "statutory use restriction" suggesting either a substantive right or duty-imposing prescription, but stopped its analysis there. The court avoided further trust analysis as it relates to a conventional fiduciary relationship although the

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[71] *United States v. White Mountain Apache Tribe*, 537 U.S. 465 (2003); *See also, Duncan v. United States*, 667 F.2d 36 (Ct. Cl. 1981).

[72] *Navajo Nation II*, 129 S.Ct. at 1558.

Appropriation Acts contain specific Congressional directives: "each of the Indians in this paragraph shall receive, as nearly as practicable, an equal amount in the value of the appropriation."[73] The Federal Circuit violated the statutory interpretative approach dictated by *Navajo II*.

Second, put another way, the Federal Circuit's one-sentence analysis ignored the Plain Meaning Rule most recently applied in *Carcieri*:

> This case requires us to apply settled principles of statutory construction under which we must first determine whether the statutory text is plain and unambiguous. *United States v. Gonzales*, 520 U.S. 1, 4, 117 S.Ct. 1032, 137 L.Ed.2d 132 (1997). If it is, we must apply the statute according to its terms.[74]

The Circuit avoided interpreting the Appropriation Acts' plain language that the Secretary of the Interior was to ensure each Indian beneficiary "shall receive, as nearly as practicable, an equal amount in value of this appropriation." Without analyzing the text, the Federal Circuit concluded the statute provided "minimal direction" and there was no trust duty on the Secretary of the Interior to the Petitioners regarding the "lands" purchased.

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[73] App. 154-55.

[74] *Navajo Nation II*, 129 S.Ct. at 1558 (citations omitted).

Third, the Federal Circuit's decision contradicts *Mitchell II* and *White Mountain Apache*. The Supreme Court in *Mitchell II* held that the word "trust" is not necessary in a law to create statutory trust obligations on the United States.[75]

The Federal Circuit, to the contrary, required more than what *Mitchell II* demands. The Court required the word "reservation" or "trust" expressed within the Acts.

As the *Mitchell II* Court stated, "[a]ll of the necessary elements of a common-law trust are present: a trustee (the government), a beneficiary (the Indian allottees), and a trust corpus (Indian timber, lands, and funds)." *Id.* at 225. But, the Federal Circuit failed to recognize that all the necessary elements of a common law trust are present in the *Wolfchild* case: a trustee (Secretary of the Interior), beneficiaries (petitioners) and a trust corpus (1886 lands).

The Federal Circuit's decision also contradicts *White Mountain Apache*. In *White Mountain Apache*, the Court held under the fair inference rule that a 1960 Congressional Act at issue created fiduciary duties on Interior:

> The 1960 Act goes beyond a bare trust and permits a fair inference that the Government is subject to duties as a trustee and liable in

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[75] *Mitchell II*, 463 U.S. at 225-26; *see also*, *Carcieri*, at 129 S.Ct. at 1063-64.

> damages for breach. . . . [T]he fact that the property occupied by the United States is expressly subject to a trust supports a fair inference that an obligation to preserve the property improvements was incumbent on the United States as trustee. . . . "One of the fundamental common-law duties of a trustee is to preserve and maintain trust assets."[76]

The Federal Circuit did not apply the fair inference rule.

In summary, because the Appropriation Acts place an express statutory duty on the Secretary of the Interior to ensure that 1886 Mdewakanton beneficiaries "shall receive, as nearly as practicable, an equal amount in value of this appropriation" – there is more evidence of statutory intent of a trust obligation than the minimal requirements of *Mitchell II* and *White Mountain Apache* require and something more than a "statutory use restriction." Therefore, the Federal Circuit's analysis not only contradicts *Mitchell II* and *White Mountain Apache,* but represents a major shift in interpretation of statutes and in application of trust principles to Native American statutes.

The doctrinal shift is further evidenced by the Federal Circuit's decision not to apply its own presumption that "Congress is knowledgeable about

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[76] *White Mountain Apache Tribe*, 537 U.S. at 474-77 (footnotes and citations omitted).

existing law pertinent to legislation it enacts."[77] This presumption and deference to the common law governing the statutory enactments at the time of passage, requires the application of the then known trust law to ascertain whether Congress intended to create a trust. This presumption is consistent with trust law:

> In construing an inter vivos trust, the provisions of the trust are to be governed by the law existing *at the time of its creation*, not the law and public policy in effect at the time the construed words will take effect, absent a contrary intention within the instrument itself.[78]

This requires an analysis of Congress' presumption of knowledge. In this case, the Federal Circuit did not do the required analysis. The applicable trust law at the time of enactment is essential to statutory interpretative analysis in Indian trust law cases. For example, *A Practical Treatise on the Law of Trust,* vol. 1, 24 (Thomas Lewin, Frederick Lewin and James H. Flint, 1st Am. ed., Charles H. Edson 1888) finds in the creation of a trust that a person,

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[77] *See, e.g., Canadian Lumber Trade Alliance v. United States,* 517 F.3d 1319, 1343 (Fed. Cir. 2008), *quoting Bristol-Myers Squibb Co. v. Royce Lab.*, 69 F.3d 1130, 1136 (Fed. Cir. 1995) (internal quotation omitted).

[78] 76 Am. Jur. 2d Trusts § 36 (2008) (citations omitted) (emphasis added).

> [N]eed only make his meaning clear as to the interest he intends to give, without regarding the technical terms of the common law in limitation of legal estates . . . *provided words be used which thought not technical are yet popularly equivalent*, or the intention otherwise sufficiently appears upon the face of the instrument.[79]

Congress used the popular equivalent of "trust" language when it created an express statutory duty on the Secretary of the Interior that the Indian beneficiaries "shall receive, as nearly as practicable, an equal amount in value of this appropriation." The Federal Circuit's absence of analysis regarding Congressional presumptive knowledge of trust law at the time of enactment reflects a lapse in statutory trust analysis.

The Federal Circuit decision further conflicts with the principles espoused in its predecessor United States Court of Claims in *Duncan v. United States*.[80] The *Duncan* court explained that: "it is difficult to see why Congress should have to do more to create an Indian trust than a private settlor would have to do to establish a private trust."[81] Under *Duncan*, if an

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[79] *Id.* at 147-48 (emphasis added). *See also, id.* at 70, 71 n. 1; *A Treatise on the Law of Trusts and Estates*, vol. 1, 68 (Jarias Ware Perry, 4th ed., Little Brown, 1889).

[80] *Duncan v. United States*, 229 Ct. Cl. 120, 667 F.2d 36 (1981).

[81] 667 F.2d at 42 n. 10.

appropriation act text would create a private trust, then the same text in public law creates a trust, too. Thus, if a private person who accepted an express duty to ensure that certain beneficiaries "shall receive, as nearly as practicable, an equal amount in value of this appropriation" is a trustee, then the Secretary of the Interior is also a trustee by the same language found in the Appropriation Acts. The Federal Circuit's one-sentence analysis contradicts *Duncan's* principle that "Congress should not have to do more than a private settlor to create a trust."

Ultimately, the Federal Circuit's statutory interpretative approach towards Congressional Acts shifts away from 30 years of Supreme Court precedent in Native American trust cases: *Mitchell I, Mitchell II, Navajo Nation I, White Mountain Apache, Navajo Nation II* and *Carcieri*. The Supreme Court should grant review to ultimately determine whether the Federal Circuit's doctrinal shift espoused in *Wolfchild* has eviscerated, modified, or undermined this Court's interpretative analysis of Indian trust law.

IV. The Federal Circuit's Statutory Interpretative Approach on the Second Certified Question Contradicts the Plain Meaning Rule, *Carcieri*, 25 U.S.C. § 462, *Passamaquoddy's* "Plain and Unambiguous" Requirement and Established Congressional Practice Regarding Indian Trust Termination.

The *Wolfchild* Federal Circuit decision is contrary to *Carcieri*, 25 U.S.C. § 462, and ultimately as the decision pertains to trust terminations as found in *Passamaquoddy Tribe*.[82] In the first instance, the Circuit found *Carcieri* not relevant to the questions before it.[83] Simply, the Federal Circuit held that the post-1934 IRA non-tribal community governments are the exclusive beneficiaries of the lands purchased under the 1888, 1889 and 1890 Appropriation Acts. But, the Circuit's holding is contrary to *Carcieri* and therefore *Carcieri* is relevant.

Carcieri relates to the legal identity of the Prairie Island, Lower Sioux, and Shakopee Communities under the 1934 IRA. The legal basis under the 1934 IRA for the federally-recognized community governments was the 1886 Loyal Mdewakanton residing on

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[82] *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 528 F.2d 370, 380 (C.A. Me. 1975).

[83] The court did acknowledge Petitioners' notification of *Carcieri*, but dismissed its relevancy in a footnote. *Id.* at 1251, n. 8, App. 53. *Carcieri* was issued two weeks before the Circuit's issued decision.

reservation lands – the 1886 lands. Furthermore, this statutorily-defined class of beneficiaries is a "band" – not a "tribe" – of Loyal Mdewakanton. This "band" was found by Interior to be under federal jurisdiction in 1934.

Thus, if there were any "ownership interests" in the 1886 lands, it was those of the 1886 Mdewakanton and their descendants in 1934, not the political governments created 2 or 35 years later. The Federal Circuit concluded that:

> [A]s of the time of the 1980 Act, those lands were being held by the Department of the Interior for use by the 1886 Mdewakantons and their descendants pending an ultimate legislative determination as to how the ownership interests in the lands should be allocated. That determination came in 1980, when Congress provided that legal title in the lands would be held by the United States, which would hold the lands in trust for the three communities.[84]

The Federal Circuit's conclusion is antithetical to this Court's holding in *Carcieri*. The Circuit's decision, not to apply the *Carcieri* reasoning as it applies to the 1934 IRA, goes directly to whether the instant Petitioners or other Native Americans and Native American tribes will have federal courts to adjudicate their claims. As *Carcieri* explained:

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[84] *Wolfchild*, 559 F.3d at 1255, App. 62.

> [F]or purposes of [IRA] § 479, the phrase "now under Federal jurisdiction" refers to a tribe that was under federal jurisdiction at the time of the statute's enactment. As a result, § 479 limits the Secretary's authority to taking land into trust for the purpose of providing land to members of a tribe that was under federal jurisdiction when the IRA was enacted in June 1934. Because the record in this case establishes that the Narragansett Tribe was not under federal jurisdiction when the IRA was enacted, the Secretary does not have the authority to take the parcel at issue into trust.[85]

Thus, *Carcieri* suggests that the Minnesota Mdewakanton post-1934 IRA non-tribal community governments established in 1936 (two) and in 1969 (one) are not "Indian tribes" under § 476. Here, the Mdewakanton Communities do not have a legal identity independent, separate and apart from the 1886 Mdewakanton under the IRA. Consequently, there is nothing in the 1980 Act's references to each of the Mdewakanton Communities to suggest Congressional intent to exclude 95% of the 1886 Mdewakanton from the subject matter of the Appropriation Acts – the 1886 lands and benefits derived therefrom – to allow 5% of the 1886 Mdewakanton and non-1886 Mdewakanton to receive 100% of the 1886 lands and its benefits.

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[85] *Carcieri*, 129 S.Ct. at 1061.

Carcieri reinforces this point. The Federal Circuit was required, in light of *Carcieri*, to determine whether the Communities have a legal identity independent, separate and apart from the petitioners, who as original beneficiaries under the Appropriation Acts did in fact have a legal identity under the 1934 IRA. Instead, the Circuit found the 1980 Congressional Act as an alteration of the ownership status of 1886 lands:

> whereby the United States would hold legal title to the lands and each of the communities would hold equitable title to the portions of the 1886 lands allocated to it.[86]

But, *Carcieri* required the Federal Circuit to answer who is the ultimate beneficiary of the "lands" after the 1980 Act. The Federal Circuit refused to do so – finding *Carcieri* not relevant. The Federal Circuit's decision not to apply *Carcieri* and failure to answer this question – leaves a legal quagmire for the trial court to resolve.

Importantly, 25 U.S.C. § 462, part of the 1934 IRA, continued all Indian land beneficiary rights unless terminated by Congressional enactment:

> The existing periods of trust placed upon any Indian lands and any restriction on alienation thereof are extended and continued until otherwise directed by Congress.

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[86] *Wolfchild*, 559 F.3d at 1255, App. 62-63.

Another important question under 25 U.S.C. § 462 in this case is whether Congress is required to "plainly and unambiguously" terminate Indian beneficiary rights. The Federal Circuit did not apply a "plain and unambiguous" legal standard in determining whether the 1980 Act was a trust termination act.

The Federal Circuit's failure to apply the "plain and unambiguous" legal standard contradicts longstanding precedent of the U.S. Court of Appeals regarding statutory trust termination: "[A]ny *withdrawal of trust obligations* by Congress [with Indians] would have to have been 'plain and unambiguous' to be effective."[87] *Passamaquoddy's* legal standard is consistent with 25 U.S.C. § 462 which extends all Native American trust beneficiary rights in perpetuity and requires Congress to provide "directions" to terminate Indian trust beneficiary rights.

Moreover, *Passamaquoddy's* legal standard is consistent with the law of trusts which provides that any termination or modification of a trust must be done by "clear and convincing evidence."[88] The primary concern is that beneficiaries receive adequate notice of enactment of the trust termination act *before* enactment of the trust termination act – presumably so they can lobby against it.

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[87] *Joint Tribal Council of the Passamaquoddy Tribe*, 528 F.2d at 380 (emphasis added).

[88] Restatement (Third) of Trusts § 63(3) (2003).

As the U.S. Court of Federal Claims recognized, absent in the 1980 Act is Congressional use of the "plain and unambiguous" language to terminate the government's trust obligations to the Indian beneficiaries as found in earlier trust termination acts.[89]

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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[89] *See* 25 U.S.C. § 677 (Ute Tribe); 25 U.S.C. § 564 (Klamath Tribe); 25 U.S.C. § 741 (Paiute Tribe); 25 U.S.C. § 691 (certain tribes and bands of Indians located in western Oregon); 70 Stat. 893 (Wyandotte Tribe); 70 Stat. 937 (Peoria Tribe); 70 Stat. 963 (Ottawa Tribe); 65 Stat. 250 (Menominee Tribe); and 25 U.S.C. § 980 (Ponca Tribe).

559 F.3d 1228

United States Court of Appeals,
Federal Circuit.

Sheldon Peters WOLFCHILD, et al., Ernie Peters Longwalker, et al., Scott Adolphson, et al., Morris J. Pendleton, et al., Barbara Feezor Buttes, et al., Winifred St. Pierre Feezor, et al., Autumn Weaver, et al., Aries Bluestone Weaver, et al., Elijah Bluestone Weaver, et al., Ruby Minkel, et al., Lavonne A. Swenson, et al., Willis Swenson, et al., Aaron Swenson, et al., Beverly M. Scott, et al., Lillian Wilson, et al., Monique Wilson, et al., Sandra Columbus Geshick, et al., Cheryl K. Lorusso, et al., Jennifer K. Lorusso, et al., Cassandra Shevchuk, et al., Jason Shevchuk, et al., James Paul Wilson, et al., Eva Grace Wilson, et al., Benita M. Johnson, et al., and Kevin Lorusso, et al.,
Plaintiffs-Appellees,
and
Harley D. Zephier, Sr., et al.,
Plaintiffs-Appellees,
and
Elizabeth T. Walker, Walker Group, and John Does 1-30,
Plaintiffs-Appellees,
and
Gertrude Godoy, et al., Michael Stephens, et al., Jesse Cermak, et al., Delores Klingberg, et al., Sally Ella Alkire, et al., Pierre George Arnold, Jr., et al., and Denise Henderson, et al.,
Plaintiffs-Appellees,
and
Lower Sioux Indian Community,
Plaintiffs-Appellees,

and
Winona C. Thomas Enyard, et al.,
and Jeffrey Arnold Kitto, et al.,
Plaintiffs-Appellees,
and
Madaline Rocque, et al., Mary Taylor
(Tatewastewin), et al., Margaret (Dumarce)
Prescott, et al., and Joseph Coursolle, et al.,
Plaintiffs-Appellees,
and
Mary Beth Lafferty, et al., Anita D. Whipple, et al.,
Bonnie Rae Lowe, et al., and
Lenor A. Scheffler Blaeser, et al.,
Plaintiffs-Appellees,
and
Julia Dumarce, et al.,
Plaintiffs-Appellees,
and
Francine Garreau Hall, et al.,
Plaintiffs-Appellees,
and
Kristine Abrahamson, et al.,
Plaintiffs-Appellees,
and
Victoria Robertson Vadnais, et al.,
Plaintiffs-Appellees,
and
Marvel Jean Dumarce, et al., and Vivian Cordelia
Youngbear, et al.,
Plaintiffs-Appellees,
and
Danny Lee Mozak, et al.,
Plaintiffs-Appellees,
and

Dawn Burley, Raymond Cournoyer, Sr., Francis Elaine Felix, Rebecca Elizabeth Felix, Lydia Ferris, Leslie Lee French, Dawn Henry, Sandra Kimbell, Jerry Robinette, Vera A. Rooney, Deborah L. Saul, Robert Lee Taylor, Daniel M. Trudell, Laura Vassar, Charlene Wanna, Ke Zephier, and John Does 31-433,
Plaintiffs,

v.

UNITED STATES,
Defendant-Appellant.
No. 2008-5018.

March 10, 2009.
Rehearing En Banc Denied June 11, 2009.

Erick G. Kaardal, Mohrman & Kaardal P.A., of Minneapolis, MN, argued for all plaintiffs-appellees Sheldon Peters Wolfchild, et al.

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Elizabeth T. Walker, Walker Law LLC, of Alexandria, VA, for plaintiffs-appellees Walker Group, et al.

Jack E. Pierce, Pierce Law Firm, P.A., of Minneapolis, MN, for plaintiffs-appellees Gertrude Godoy, et al.

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Scott A. Johnson, Johnson Law Group, of Minnetonka, MN, for plaintiffs-appellees Madaline Rocque, et al.

Wood R. Foster, Jr., Siegel Brill Greupner Duffy & Foster P.A., of Minneapolis, MN, for plaintiffs-appellees Mary Beth Lafferty, et al.

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Randy V. Thompson, Nolan, MacGregor, Thompson & Leighton, of Saint Paul, MN, for plaintiffs-appellees Kristine Abrahamson, et al.

Royce D. Edwards, Jr., of Joplin, MO, for plaintiffs-appellees Victoria Robertson Vadnais, et al., of Britton, SD, for plaintiffs-appellees Marvel Jean DuMarce, et al.

Barry P. Hogan, Renaud Cook Drury Mesaros, PA, of Phoenix, AZ, for plaintiffs-appellees John Doe, 1-433, et al. Of counsel was Elizabeth T. Walker, Walker Law LLC, of Alexandria, VA.

Garrett J. Horn, Horn Law Office, of Yankton, SD, for plaintiffs-appellees Lydia Ferris, et al.

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Aaron P. Avila, Trial Attorney, Appellate Section, Environment and Natural Resources Division, United States Department of Justice, of Washington, DC, for defendant-appellant. With him on the brief were Ron L. Tenpas, Assistant Attorney General and Laura Maroldy, Attorney.

Before RADER, BRYSON, and PROST, Circuit Judges.

BRYSON, Circuit Judge.

This case comes to us on interlocutory appeal from the Court of Federal Claims. The plaintiffs in the underlying action claimed that the government breached its fiduciary obligations with respect to certain real property that the government was required to hold in trust for them. The order on appeal sets forth two questions of law as to which the trial court concluded that there is a substantial ground for difference of opinion and that an immediate appeal could materially advance the ultimate termination of the litigation. *See* 28 U.S.C. § 1292(d)(2). We address

those two questions of law in this opinion and reverse the trial court's ruling as to each question.

I

The trial court's opinions contain a thorough canvass of the complex factual and legal background of this case. *See Wolfchild v. United States,* 62 Fed.Cl. 521, 526-35 (2004) (*Wolfchild I*); *Wolfchild v. United States,* 68 Fed.Cl. 779, 782-83, 785-94 (2005) (*Wolfchild II*). We borrow heavily from the trial court's analysis of the facts and the governing legal principles, even though at the end of the day we disagree with the trial court's legal conclusions as to the two questions certified for appeal.

A

In 1862, the Minnesota Sioux, who were then living on a reservation in southern Minnesota, rebelled against the United States. After the uprising was quelled, Congress annulled the treaties that had established the reservation and that had provided for an annuity to be paid to the tribe. *See* Act of Feb. 16, 1863, ch. 37, 12 Stat. 652; Act of Mar. 3, 1863, ch. 119, 12 Stat. 819. The effect of that action was to confiscate all of the tribe's reservation lands in Minnesota and force the Sioux to relocate farther west.

During the uprising, some of the Sioux remained loyal to the United States. Many of those individuals severed their ties to the tribe and remained in

Minnesota. However, the government's confiscation of the Sioux lands and the termination of the annuities that were paid pursuant to the annulled treaties left those individuals poverty-stricken and homeless. In recognition of their situation, Congress took steps to assist those individuals. The group, which consisted of approximately 200 individuals, were known as the "loyal Mdewakantons," a reference to the Mdewakanton band of the Sioux tribe with which they had been affiliated.

In the 1863 statute that annulled the Sioux treaties, Congress authorized the Secretary of the Interior to set aside parcels of 80 acres of public land for any individual among the Minnesota Sioux "who exerted himself in rescuing the whites" during the 1862 revolt. Act of Feb. 16, 1863, § 9, 12 Stat. at 654. Congress further provided that the allotted land "shall not be subject to any tax, forfeiture, or sale, by process of law, and shall not be aliened or devised, except by the consent of the President of the United States, but shall be an inheritance to said Indians and their heirs forever." *Id.* Two weeks after the enactment of that provision, however, Congress superseded it with another statute dealing with the same authorization. Unlike in the earlier statute, Congress did not attempt to define the property interest that the Indians would receive in lands that were to be set aside for them. Instead, the later statute provided that any lands that were assigned would be "held in such tenure as is or may be provided by law." Act of Mar. 3, 1863, § 4, 12 Stat. at

819. Thus, in that statute (as was to be the case on several subsequent occasions), the issue of the ownership rights in the land that was to be set aside for the use of the loyal Mdewakantons was not resolved, but was left for later determination.

The Secretary never exercised the authority granted by the 1863 legislation, and no lands were provided to the loyal Mdewakantons at that time, apparently because of opposition by white settlers to allowing even the loyal Sioux to settle in the state. *See* H.R. Exec. Doc. No. 39-126, at 10 (1865) ("Congress . . . provided lands [for the loyal Mdewakantons] near their old homes, but [they] are not allowed by the whites to live upon and cultivate them"); H.R. Exec. Doc. No. 50-61, at 2 (1889) (the Secretary withdrew property from the public lands for the loyal Mdewakantons, "but such was the blind fury of the whites after the outbreak of 1862 and 1863 that these Indians were also removed").

Two years later, however, Congress recognized that those individuals, who "at the risk of their lives aid[ed] in saving many white men, women, and children from being massacred," had as a result been forced to sever their relationships with the tribe and "were compelled to abandon their homes and property, and are now entirely destitute of means of support." Act of Feb. 9, 1865, ch. 29, 13 Stat. 427; *see* H.R. Exec. Doc. No. 39-126, at 3. Congress at that time appropriated $7,500 to provide for the loyal Mdewakantons, but it took no further action to assist them until the 1880s. In the intervening years, many

of the loyal Mdewakantons, who were impoverished and faced continuing hostility from white settlers, left Minnesota. *See* Roy W. Meyer, *History of the Santee Sioux* 258-72 (1967).

On several occasions beginning in 1884, Congress appropriated funds to be used for the benefit of the Mdewakantons who had remained in Minnesota or had returned to the state. In 1884, Congress appropriated $10,000 to purchase stock "and other articles necessary for their civilization and education, and to enable them to become self-supporting." Act of July 4, 1884, ch. 180, 23 Stat. 76, 87. The following year, Congress amended that Act to allow the Secretary of the Interior to disburse funds to the Mdewakantons "for agricultural implements, lands, or cash, as in his judgment may seem best for said Indians." Act of Mar. 3, 1885, ch. 341, 23 Stat. 362, 375. And in the next year, Congress appropriated another $10,000 for the purchase of "such agricultural implements, cattle, lands, and in making improvements thereon, as in [the Secretary's] judgment may seem best for said Indians." Act of May 15, 1886, ch. 333, 24 Stat. 29, 39-40.

Under the authority of those statutes, Interior Department officials purchased land and distributed it to several of the loyal Mdewakantons, giving them fee simple ownership of the properties. *Sixtieth Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior* 111 (1891). That effort failed to provide long-term relief for the Mdewakantons, however, because as Interior Department officials

later acknowledged, most of the recipients of the land grants sold, abandoned, or encumbered the properties. After that time, the Interior Department discontinued the practice of transferring land to the loyal Mdewakantons in fee.

In 1888, 1889, and 1890, Congress enacted the three pieces of legislation that are the central focus of this case. In each of those statutes, which are referred to in this litigation as "the Appropriations Acts," Congress appropriated funds for the support of a number of designated Indian tribes. Each Act contained, among the many designated appropriations for the support of particular groups of Indians, a paragraph allocating a small sum to be used for the benefit of the Mdewakantons who had remained in Minnesota after the 1862 revolt or had returned to Minnesota in the following years. *See* Act of June 29, 1888, ch. 503, 25 Stat. 217, 228-29 ($20,000); Act of Mar. 2, 1889, ch. 412, 25 Stat. 980, 992-93 ($12,000); Act of Aug. 19, 1890, ch. 807, 26 Stat. 336, 349 ($8,000). The Secretary of the Interior was authorized to spend those appropriated funds as he saw fit for the benefit of the qualifying Mdewakantons. The statutes authorized the purchase of agricultural implements, cattle, horses, food, clothing, buildings, seed, or land, at the discretion of the Secretary.

Although each of the Appropriations Acts used slightly different language, the operative provisions were largely similar. The 1890 Act, for example, provided as follows, in pertinent part:

> For the support of the full and mixed blood Indians in Minnesota heretofore belonging to the Medewakanton band of Sioux Indians, who . . . have severed their tribal relations, eight thousand dollars, to be expended by the Secretary of the Interior as in his judgment he may think best, for such lands, agricultural implements, buildings, seeds, cattle, horses, food, or clothing as may be deemed best in the case of each of these Indians or families thereof. . . .

26 Stat. at 349. The 1889 and 1890 Acts also provided that the appropriated funds should be "so expended that each of the Indians in this paragraph mentioned shall receive, as nearly as practicable, an equal amount in value of this appropriation." 25 Stat. at 992-93; 26 Stat. at 349. Although the 1888 Act contained no such proviso, the 1889 Act stipulated that the "equal amount" requirement should apply to the funds appropriated under the 1888 Act. 26 Stat. at 993. Two other differences among the three statutes are (1) the 1888 and 1889 Acts made provision for "full blood" Mdewakantons, while the 1890 Act made provision for "full and mixed blood" Mdewakantons, and (2) the 1889 and 1890 Acts gave the Secretary discretion to make spending decisions based on what he deemed best in the case of "each of these Indians or families thereof," while the 1888 Act made no reference to the beneficiaries' families.

The Interior Department used approximately $15,600 of the $40,000 appropriated under the three Appropriations Acts to purchase parcels of land in

various parts of southern Minnesota where the Mdewakantons had settled. Because of difficulties in determining which of the Mdewakantons qualified as "loyal" during the 1862 uprising, the Appropriations Acts provided that the appropriations would be designated for the benefit of all Mdewakantons who were living in Minnesota as of May 20, 1886. As a result, the lands purchased with funds from the three Appropriations Acts are known as "the 1886 lands," and the Mdewakantons who were statutorily eligible for benefits under the Acts are commonly referred to as "the 1886 Mdewakantons."[1] Title to those lands was taken in the name of the United States, and the deeds contained no trust designation or other limitation on title.

As of 1980, notwithstanding several intervening exchanges and sales, the 1886 lands remained largely intact. The lands consisted of a number of small plots, totaling approximately 950 acres. The tracts were located in three Minnesota counties: Scott County ("the Shakopee lands"); Redwood County ("the Lower Sioux lands"); and Goodhue County ("the Prairie

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[1] In several years after the Appropriations Acts, Congress appropriated funds for the "support and civilization" of the Mdewakantons in Minnesota. *See, e.g.*, Act of Mar. 2, 1895, ch. 188, 28 Stat. 873, 892; Act of June 10, 1896, ch. 398, 29 Stat. 321, 338; Act of June 7, 1897, ch. 3, 30 Stat. 62, 78; Act of July 1, 1898, ch. 545, 30 Stat. 571, 586; Act of Mar. 1, 1899, ch. 324, 30 Stat. 924, 938. Those later statutes, however, did not specifically authorize purchases of land, and the parties have not put those statutes at issue in this case.

Island lands"). The Department of the Interior assigned individual plots from those lands to qualifying Mdewakantons for their use and occupancy as long as they resided on or otherwise used the land. After a particular assignee died or abandoned the property, the Department would re-assign the land to another qualifying Mdewakanton. The new assignment was often made to a descendant of the previous assignee. The Interior Department, however, did not regard the interest of the assignees in the property as rights that passed through inheritance.

Pursuant to the Indian Reorganization Act of 1934, ch. 576, 48 Stat. 984, three Mdewakanton communities were formed in the three areas where the 1886 lands were located. The three communities are the Prairie Island Indian Community, the Shakopee Mdewakanton Sioux Community, and the Lower Sioux Indian Community. The enrolled membership of the three communities consists largely of lineal descendants of the Mdewakantons who were living in Minnesota in 1886, but some enrolled members are not descendants of the 1886 Mdewakantons, and many of the descendants of the 1886 Mdewakantons are not enrolled members of any of the three communities.[2] Over time, the government purchased an

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[2] As of 1979, more than 95 percent of the enrolled members of the three communities were lineal descendants of the 1886 Mdewakantons. At that time, the Lower Sioux Indian Community had 152 members (139 of whom were lineal descendants of the 1886 Mdewakantons), the Prairie Island Indian Community had 109 members (106 of whom were lineal descendants

(Continued on following page)

additional 414 acres for the Prairie Island community and an additional 872.5 acres for the Lower Sioux community. Those lands were regarded as reservation lands and as such were held in trust for those two communities. Prior to 1980, those reservation lands were treated as having a legally distinct status from the 1886 lands, even though parcels of the two classes of property were intermingled in the same areas within the geographical boundaries of the Prairie Island and Lower Sioux communities.

In 1980, Congress enacted legislation designed to give the three communities political control over all the property within the communities that had been set aside for Indians, including the 1886 lands. In particular, the legislation sought to overcome the administrative problems that resulted from the communities having two different classes of members and two different classes of property interspersed in a "checkerboard pattern" within their geographical boundaries. *See* S.Rep. No. 96-1047, at 2 (1980). In order to solve that problem, the 1980 statute provided that the 1886 lands, which "were acquired and are now held by the United States for the use or benefit of certain Mdewakanton Sioux Indians" under the Appropriations Acts, would henceforth be "held by the United States . . . in trust for" the three communities. Pub.L. No. 96-557, 94 Stat. 3262 (1980). The 1980 Act

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of the 1886 Mdewakantons), and the Shakopee Mdewakanton Sioux Community had 96 members (94 of whom were lineal descendants of the 1886 Mdewakantons).

contained a savings clause stating that the Act would not alter any rights under any contract, lease, or assignment entered into or issued prior to the Act. Thus, all of the individuals then holding assignments to the 1886 lands retained their rights to use the land unaffected by the 1980 legislation. The Interior Department, however, made no new assignments thereafter.

B

For more than a century after the purchase of the 1886 lands, those properties were used mainly for residential and agricultural purposes and were not particularly valuable.[3] However, following the introduction of casino gambling on Indian land in the mid-1990s, the situation changed dramatically. According to the complaint in this case, "profitable casinos, hotels, and other profit-making businesses have been established and developed" on the 1886 lands. As a result, the proceeds from certain of those lands and the nearby reservation lands have become extremely valuable.

Because of the position taken by the Department of the Interior that the disputed properties are held in trust for the three Mdewakanton communities, the descendants of the 1886 Mdewakantons who are not

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[3] At the time of the 1980 Act, the Interior Department estimated that the 950 acres constituting the 1886 lands were worth a total of approximately $1,500,000.

members of those communities have not received any of the proceeds from the gambling casinos and related entertainment facilities. Instead, those proceeds have gone to the enrolled members of the three communities.

In 2003, a group of individuals who claimed to be lineal descendants of the 1886 Mdewakantons filed suit in the Court of Federal Claims seeking damages from the United States based in part on an asserted breach of fiduciary duty. Over time, more individuals have joined the suit as plaintiffs, and the plaintiffs now number more than 20,000.

The plaintiffs' theory of the case was that the Appropriations Acts created a trust for the 1886 Mdewakantons and their descendants that gives the plaintiffs rights to the proceeds of the trust corpus because of their status as owners of equitable title to those lands. *Wolfchild I,* 62 Fed.Cl. at 540. They contended that the 1980 statute did not terminate that trust and that it was improper for the government, following the enactment of the 1980 statute, to treat the 1886 lands as being held in trust for the benefit of the three communities. Instead, they asserted, the proceeds of the 1886 lands should have gone to the lineal descendants of the 1886 Mdewakantons, the intended beneficiaries of the lands that were purchased with the Appropriations Acts funds. According to the complaint, each of the plaintiffs was entitled to a prorated share of "the income, profits and proceeds from all reservation lands at Shakopee, Prairie Island, and Lower Sioux (including but not limited to

per-capita payments from casino profits and other revenues)." The complaint further alleged that the government has breached its fiduciary duties by failing "to ensure that the income, profits and proceeds from all reservation businesses – including per-capita payments from casino profits – are distributed as equally as practicable among all of the trust beneficiaries of the reservation lands."

The government responded that the Appropriations Acts did not create a trust for the 1886 Mdewakantons and did not give the 1886 Mdewakantons vested ownership rights in the lands purchased with those funds. Instead, according to the government, the Appropriations Acts simply gave the Secretary of the Interior the right to purchase land or other assets to be used, subject to the Secretary's discretion, for the benefit of the 1886 Mdewakantons and their families. In the government's view, the Secretary exercised his discretion to allow the 1886 Mdewakantons and their descendants to use and occupy the land, but neither the Appropriations Acts nor any action by the Secretary conveyed any greater interest, such as legal or equitable title, on any of the beneficiaries, either individually or as a class. In addition, the government argued that after Congress in 1980 enacted legislation providing that the 1886 lands would be held in trust for the three Mdewakanton communities, the lineal descendants of the 1886 Mdewakantons retained no rights in the lands except insofar as they were enrolled members of one of the three communities or were current

assignees whose rights were preserved under the 1980 Act's savings clause.

After considering submissions from the parties and the three Indian communities,[4] the trial court concluded that the plaintiffs were correct in their contention that the Appropriations Acts created a trust relationship between the government and the 1886 Mdewakantons, that the trust relationship extended to the descendants of the 1886 Mdewakantons, and that the trust had the effect of bestowing equitable title to the 1886 lands on the beneficiary class. *Wolfchild I,* 62 Fed.Cl. at 540-43, 551, 549, 551. The court also ruled that the 1980 statute that required the government to hold the 1886 lands in trust for the three Indian communities did not have the effect of altering or terminating the trust that was established by the Appropriations Acts. *Id.* at 543-44, 551. Accordingly, the court concluded,

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[4] The three communities have not all taken the same position in this litigation. Two of the communities, the Shakopee Mdewakanton Sioux Community and the Prairie Island Indian Community, participating as amici curiae, are aligned against the plaintiffs. The third community, the Lower Sioux Indian Community, participating as an appellee, is aligned with the plaintiffs. The Lower Sioux Indian Community has explained that the most profitable casinos are on the properties of the other two communities. That may account for the decision of the Lower Sioux Indian Community, many of whose members claim to be lineal descendants of the 1886 Mdewakantons, to support the plaintiffs rather than advocating that each of the three communities is entitled to beneficial ownership of the portions of the 1886 lands allocated to it in 1980.

the 950 acres that were purchased with the funds appropriated under the three Appropriations Acts continued to be held in trust for the heirs of the 1886 Mdewakantons, and the government breached its fiduciary duties to the plaintiffs respecting that trust. *Id.* at 545, 551.

The court's rulings that the Appropriations Acts created a trust for the loyal Mdewakantons and their descendants and that the 1980 statute did not terminate that trust are central to the plaintiffs' breach-of-trust claim and are critical prerequisites to any further proceedings in the trial court, such as identifying which plaintiffs are entitled to relief and calculating the measure of damages due to various groups of plaintiffs. Accordingly, the trial court certified the following two questions for immediate review by this court pursuant to 28 U.S.C. § 1292(d)(2):

> (1) Whether a trust was created in connection with and as a consequence of the 1888, 1889, and 1890 Appropriations Acts for the benefit of the loyal Mdewakanton and their lineal descendants, which trust included land, improvements to land, and monies as the corpus; and
>
> (2) If the Appropriations Acts created such a trust, whether Congress terminated that trust with enactment of the 1980 Act.

We agreed to permit an appeal to be taken from the trial court's order, and we now undertake to answer the two certified questions.

II

Although the 1888, 1889, and 1890 Appropriations Acts make no reference to a trust, the trial court held that those statutes created a trust for the Mdewakantons who were living in Minnesota in 1886 and their descendants. The court ruled that all of the elements of a trust were present in the Appropriations Acts and that the absence of the term "trust" from the Acts was not fatal to interpreting them as imposing trust responsibilities on the government. The court regarded the corpus of the trust as the lands purchased with the funds appropriated pursuant to the Appropriations Acts. It found the beneficiaries to be sufficiently identified as the 1886 Mdewakantons and their families, including their descendants. It held that the trust obligations were sufficiently defined by the statutory requirements that the appropriated funds be expended for the benefit of the 1886 Mdewakantons and that they be expended, as nearly as practicable, so that each of the beneficiaries would receive a roughly equal amount in value from the expenditure of the appropriated funds. Finally, the court concluded that, as a consequence of the creation of the trust relationship, legal title to the 1886 lands remained in the United States, but the 1886 Mdewakantons and their descendants obtained equitable title to the lands. *Wolfchild I,* 62 Fed.Cl. at 540-43.

While it is true that a statute need not contain the word "trust" in order to create a trust relationship, the failure to use that term gives rise to

doubt that a trust relationship was intended. *See Cohen's Handbook of Federal Indian Law* § 5.05[1][b], at 429-30 (Nell Jessup Newton et al., eds., 2005) ("[W]hile the presence of the word 'trust' in a statute by itself is neither necessary nor sufficient to create a compensable claim, statutory or regulatory language using terms normally associated with trust or fiduciary law will be given great weight in the analysis."); *see also United States v. White Mountain Apache Tribe,* 537 U.S. 465, 480-81, 123 S.Ct. 1126, 155 L.Ed.2d 40 (2003) (Ginsburg, J., concurring) (distinguishing between a statute that "expressly and without qualification employs a term of art ('trust') commonly understood to entail certain fiduciary obligations" and a statute that contained no trust language and "lacked the characteristics that typify a genuine trust relationship"). That is particularly true where, as here, Congress used the term "trust" in other contemporaneous statutes dealing with the same subject matter, but did not use that term or any close proxy in the Appropriations Acts. *See, e.g.,* General Allotment Act of 1887, ch. 119, § 5, 24 Stat. 388, 389 (providing that United States will hold allotted land "in trust for the sole use and benefit of the Indian to whom such allotment shall have been made"); Act of May 1, 1888, ch. 213, art. 6, 25 Stat. 113, 115 (United States to hold land "in trust"); Act of Mar. 2, 1889, ch. 405, § 11, 25 Stat. 888, 891 (same).

The Restatement of Trusts sets forth the general principle of trust law that a trust is created "only if the settlor properly manifests an intention to create a

trust relationship." *Restatement (Third) of Trusts* § 13 (2003). The Appropriations Acts manifest no such intention on the part of Congress. Although the Appropriations Acts impose some limited restrictions as to how the appropriated funds are to be spent, those restrictions are consistent with the kinds of directions that are routinely contained in appropriations statutes dictating that the appropriated funds are to be spent for a particular purpose. The simple statutory directives as to the expenditures authorized by the Appropriations Acts do not evidence an intention on Congress's part to create a legal relationship between the Secretary of the Interior and the 1886 Mdewakantons in which the Secretary was assigned particular duties as trustee and the Mdewakantons were given enforceable rights as trust beneficiaries. If the minimal directives given to the Secretary as to the expenditure of funds were sufficient to convert the Appropriations Acts into trust instruments, it would seem that other similar, contemporaneous appropriations for the support of other groups of Indians could also be characterized as creating trust responsibilities, even though in none of those instances is there any objective evidence of congressional intention to create a trust.

Each of the three provisions that authorized expenditures for the 1886 Mdewakantons was enacted as part of a much longer statute that contained appropriations for payment of the expenses of the Indian Department and for the support of certain Indian tribes. The provisions effecting an

appropriation for the Indian Department and those authorizing support for particular groups of Indians contained no language suggestive of a trust relationship. It is difficult to read the paragraphs relating to the 1886 Mdewakantons as creating a trust relationship when the surrounding paragraphs of the same statutes, which provide for the support of other groups of Indians, are clearly just appropriation provisions that do not create trust obligations. *See, e.g.*, Act of June 29, 1888, ch. 503, 25 Stat. at 230 ("For support and civilization of the Chippewas of Lake Superior, to be expended for agricultural and educational purposes, pay of employees, purchase of goods and provisions, and for such other purposes as may be deemed for the best interests of said Indians, five thousand dollars"); Act of Mar. 2, 1889, ch. 412, 25 Stat. at 995 ("To enable the Secretary of the Interior to purchase subsistence and other necessaries for the support of the Hualapais Indians in Arizona, seven thousand five hundred dollars"); Act of Aug. 19, 1890, ch. 807, 26 Stat. at 352 ("For support and education of the Seminole and Creek Indians in Florida, for the erection and furnishing of schoolhouses, for the employment of teachers, and for the purchase of seeds and agricultural implements and other necessary articles, six thousand dollars; this money, or any part of thereof, may be used, in the discretion of the Secretary of the Interior, for the purchase of land for homes of said Seminole Indians").

The only significant difference between the Appropriations Acts and the other Indian "support" appropriations that were part of the same legislation is that the latter two Appropriations Acts contained a requirement that each of the beneficiaries "shall receive, as nearly as practicable, an equal amount in value of this appropriation." That clause, which the record materials suggest was added because of complaints that the funds from an earlier appropriation were disproportionately distributed, provides such minimal direction that it is plainly insufficient to convert what would otherwise be an appropriation into a trust.

The 1889 Act provided that any appropriated funds from that Act or the 1888 Act that were not spent during the current fiscal year "shall, notwithstanding, be used and expended for the purposes for which the same amount was appropriated and for the benefit of the above-named Indians." Act of Mar. 2, 1889, 25 Stat. at 992. Although the trial court concluded that the presence of that carry-over provision in the 1889 Act helped demonstrate Congress's intent to create a trust for the Mdewakantons, the contemporaneous history of the provision actually supports the contrary inference. The provision was included in the 1889 Act, apparently without comment, but when the same language was proposed to be included in the 1890 Act, it was removed after members of Congress objected that it would be "remarkable" to include such a provision in an appropriations bill. 21 Cong. Rec. 7586 (1890)

(remarks of Sen. Cockrell). The fact that Congress removed the carry-over provision from the 1890 Act because it was deemed to be inappropriate for an appropriations bill supports the government's argument that Congress viewed the Mdewakanton clauses of the Appropriations Acts as ordinary appropriations provisions.

The Lower Sioux Indian Community argues that the placement of the Appropriations Acts under the heading "Fulfilling Treaty Stipulations with and Support of Indian Tribes" indicates that those appropriations conveyed equitable title to the 1886 lands to the loyal Mdewakantons and their descendants. *See Quick Bear v. Leupp,* 210 U.S. 50, 77, 80, 28 S.Ct. 690, 52 L.Ed. 954 (1908) (distinguishing between Indian funds appropriated under the heading "Fulfilling Treaty Stipulations with and Support of Indian Tribes," which were administered on behalf of the Indians by the government, with funds appropriated under the subcategory "Support of Schools," which constituted a mere gratuitous appropriation of public monies). Unlike the appropriation at issue in *Quick Bear,* however, the Appropriations Acts were not enacted pursuant to any treaty with the Mdewakantons, and therefore cannot fairly be characterized as "payment . . . of a treaty debt in installments." *See id.* at 81, 28 S.Ct. 690. Furthermore, although the Appropriations Acts were not placed in the sections entitled "Miscellaneous Supports," each of the three expenditures was explicitly appropriated "[f]or the support of" loyal Mdewakantons. *See* 25 Stat. at 228; 25 Stat.

at 992; 26 Stat. at 349. That is not the language typically used in clauses directed at fulfilling treaty obligations, and it is in fact analogous to the language used in the expenditures deemed to be gratuitous appropriations in the *Quick Bear* case. *See Quick Bear,* 210 U.S. at 77, 28 S.Ct. 690. Thus, the placement of the Mdewakanton clauses in the Appropriations Acts does not support the contention that the Appropriations Acts constituted a conveyance of trust property.

Finally, nothing in the legislative history of the three provisions at issue in this case indicates that they were designed to create a trust relationship. Instead, the sponsors of the special provisions for the Mdewakantons referred to them as the intended "beneficiaries of this appropriation," 18 Cong. Rec. 2977 (1888) (remarks of Rep. McDonald), and characterized the payment as "a gratuity to these peaceable Indians, because they were peaceable and because they suffered at the hands of other Indians on account of their loyalty to the United States," 21 Cong. Rec. 7587 (remarks of Sen. Dawes), and "a gratuity to the amount stated in this bill to these Indians who have thus remained faithful to civilization and humanity in the most trying period which the people of my State were ever called upon to go through," 21 Cong. Rec. 7588 (1890) (remarks of Sen. Dawes). The language and context of the Appropriations Acts thus strongly support the view that those provisions constituted simple appropriations, and did not create a trust relationship.

Recognizing that the language and legislative history of the Appropriations Acts do not provide compelling evidence that the Acts created a trust, the trial court based its decision principally on the context in which the Acts were enacted and on the contemporaneous and subsequent treatment of the 1886 lands by the Department of the Interior and Congress. *Wolfchild I,* 62 Fed.Cl. at 541-43. We have examined all of the legislative and administrative materials referred to by the court and called to our attention by the parties. While the legal issue is a complex one and untangling the historical materials is difficult, we conclude that the Appropriations Acts are best interpreted as merely appropriating funds subject to a statutory use restriction, and not creating a trust relationship through which the 1886 Mdewakantons and their descendants obtained beneficial ownership rights in the 1886 lands.[5]

The analysis of this issue is further complicated by the fact that, in the years between 1888 and 1980,

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[5] Because certain terms have been used inconsistently by different sources and at different times, we wish to make clear at the outset that when we use the terms "equitable" or "beneficial" title or ownership with respect to land that is held in trust, we refer to the trust beneficiary's ownership of all interests in the land except for legal title. The plaintiffs in their complaint use the term "equitable title" for that purpose, *see* Fifth Amended Complaint ¶ 8, and the trial court has used that term most of the time, *see Wolfchild I,* 62 Fed.Cl. at 534, 540, 543, 549, with some variation, *see Wolfchild v. United States,* 72 Fed.Cl. 511, 528 (2006) ("equitable interest"); *id.* at 532 ("beneficial owner").

Interior Department officials at times characterized the 1886 lands as being held in trust for the 1886 Mdewakantons and their descendants. What is important, however, is not what terms were used to refer to the relationship between the government and the beneficiaries of the Appropriations Acts, but the substance of what Congress did through the Appropriations Act and what, if any, property interest the beneficiaries obtained in the 1886 lands as a result. On that issue, as we shall see, the Interior Department's policy remained unchanged from the 1890s until 1980. The Department's consistent position was that the United States owned those lands and that the 1886 Mdewakantons and their descendants who were assigned plots from the 1886 lands were limited to temporary use and occupancy of those plots. For the reasons discussed below, we conclude that the Interior Department's position is correct – that the 1886 Mdewakantons and their descendants never obtained vested rights in the 1886 lands. In short, nothing in the Appropriations Acts or the conduct of the Interior Department had the effect of conveying equitable title in the 1886 lands to the 1886 Mdewakantons and ultimately to their lineal descendants.

A

The trial court noted that in the 1863 statute that first acknowledged the contributions of the loyal Mdewakantons during the Sioux uprising, Congress authorized the conveyance of land for "each

individual of the before-named bands who exerted himself in rescuing the whites from the late massacre of said Indians." Act of Feb. 16, 1863, 12 Stat. at 654. The 1863 statute provided that the property "shall not be aliened or devised, except by the consent of the President of the United States, but shall be an inheritance to said Indians and their heirs forever." *Id.* That language clearly would have created an inheritable beneficial interest in the recipients of any land conveyed under the statute. The trial court regarded the 1863 statute as relevant to the proper interpretation of the Appropriations Acts, which were enacted 25 years later, stating that the 1888 Act was "motivated in part by the fact that the 1863 Act was not successfully implemented." *Wolfchild I,* 62 Fed.Cl. at 542.

While Congress's motivation to assist the loyal Mdewakantons no doubt derived in part from the failure of earlier efforts at assistance, it is clear that Congress did not use the 1863 statute as a model for the Appropriations Acts. To begin with, there is a significant difference between the language used in the 1863 statute and the language used in the Appropriations Acts. The 1863 statute referred solely to allotments of land, while the Appropriations Acts referred to the purchase of a wide variety of assets within the discretion of the Secretary of the Interior. Moreover, the first of the two 1863 statutes expressly stated that the beneficiaries would obtain an inheritable interest in the allotted lands, while the Appropriations Acts say nothing about the nature of

the ownership interest in any of the purchased lands. Those differences strongly suggest that Congress intended an approach in the Appropriations Acts different from the approach used in the first 1863 statute.

Even more telling is that the second of the two 1863 statutes, which was enacted only two weeks after the first and superseded it, merely authorized the Secretary to assign land to those who had assisted the white settlers during the uprising; it did not prescribe any particular form of ownership interest in the properties. Instead, it pointedly left open the nature of the interest that the assignees would have in the lands, stating that the lands would be "held by such tenure as is or may be provided by law." Thus, the failure of the 1863 Acts cannot be viewed as leading Congress to create permanent ownership interests in the 1886 lands along the same lines set forth in the first 1863 statute, because the second of the two 1863 Acts left the question of ownership open to later resolution. That approach, of postponing resolution of the ownership question, is the same as the interpretation the Interior Department was later to accord to the Appropriations Acts with respect to the ownership of the 1886 lands.

The plaintiffs point to the references in two of the Appropriations Acts (the 1889 and 1890 Acts) to the "family" or "families" of the 1886 Mdewakantons as suggesting that the Appropriations Acts were intended to create vested ownership rights in the purchased land, as was explicitly proposed in the first

1863 statute. The language of the Appropriations Acts, however, makes clear that the references to the Mdewakantons' families was not directed at creating rights of inheritance in the properties purchased, but instead was simply part of the directive to the Secretary as to the scope of his discretion in spending the appropriated funds. The 1890 statute, for example, directed that the funds were to be spent on such items as lands, agricultural implements, buildings, cattle, horses, food, or clothing "as may be deemed best in the case of each of these Indians or families thereof." Act of Aug. 19, 1890, ch. 807, 26 Stat. at 349. That language makes clear that the authorization for expenditures extended to cover the needs of the families of the beneficiaries, not simply the needs of the beneficiaries themselves. It does not speak to the nature of the interest created in any real property purchased with the funds.

The events immediately preceding the Appropriations Acts shed light on the nature of the course Congress chose in the Appropriations Acts and the reasons for its choice. In the years shortly before the enactment of the Appropriations Acts, Congress had authorized the transfers of land to individual Indians in two different ways. In the General Allotment Act of 1887, ch. 119, 24 Stat. 388, Congress authorized the Interior Department to grant individual Indians permanent interests in land, with the proviso that the conveyances would be subject to a 25-year restriction on alienation during which time the United States would hold the land in trust for the recipients. At the

expiration of the trust period, the Act provided, "the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance [sic] whatsoever." 24 Stat. at 389. Significantly, even though the first of the Appropriations Acts was enacted only a year after the General Allotment Act, and with respect to the same subject matter as the first 1863 statute, the Appropriations Acts differed from those two predecessors in that it contained no reference to the creation of trust responsibilities or rights of inheritance in the purchased lands.

Also relevant to an assessment of Congress's intentions as to the interests to be conveyed under the Appropriations Acts are the immediately preceding 1884, 1885, and 1886 statutes that sought to make provision for the loyal Mdewakantons. Those statutes used language similar to the language used in the Appropriations Acts, and neither Congress nor the Interior Department gave any indication that they regarded that language as mandating the creation of a trust relationship. In fact, the Interior Department elected to convey the lands purchased with the 1884, 1885, and 1886 funds to the beneficiaries in fee, although it promptly became clear that the fee transfers failed of their purpose when the recipients sold or encumbered the property.

Thus, at the time of the Appropriations Acts, Congress had two recent models before it for conveying land rights to the 1886 Mdewakantons, one of which explicitly created a trust relationship and one

of which plainly did not. In drafting the Appropriations Acts, Congress chose the more flexible language that did not expressly create a trust relationship. In this context, the best reading of the Appropriations Acts is that Congress did not elect to create a trust relationship, but instead chose language simply authorizing the expenditure of funds for a particular purpose, with the Secretary of the Interior being given broad discretion to select not only which items to purchase but also, implicitly, what type of interest to convey in any lands that might be purchased with the appropriated funds.

The Interior Department recognized, of course, that Congress intended the 1886 Mdewakantons to be the specific beneficiaries of the Appropriations Acts. The Secretary of the Interior accordingly sought to ensure that the funds appropriated under the Act would be spent for the benefit of those individuals. With respect to funds that were used to purchase land (as opposed to personal property that was rapidly consumed), the Secretary adopted a policy designed to promote Congress's intent by assigning the land to individuals from within the group of 1886 Mdewakantons and subsequently to individuals from within the class of the descendants of those Mdewakantons.

Contemporaneous documents make clear that the Secretary of the Interior considered himself bound by the terms of the statutes to reserve the usage of the 1886 lands for members of the particular beneficiary class (the 264 individuals determined by

a contemporaneous Interior Department census to constitute the 1886 Mdewakantons), and that he did so by selecting assignees from within that group. Later, in the absence of any congressional direction as to the ultimate disposition of ownership interests in the lands, the Secretary selected successor assignees from the class of lineal descendants of those beneficiaries. In both instances, the Secretary held the property for the use and benefit of individuals selected from a defined class.

Nothing in the text of the Appropriations Acts effected or required the conveyance to any particular Mdewakanton of a permanent interest in the 1886 lands, such as equitable title. Nor did the Interior Department treat the Appropriations Acts as creating any such interest. Although the descendants of an assignee were typically awarded assignments of property after the death of the previous assignee, that practice was not universal, and the descendants were not regarded as having a legal right to that successor assignment. Indeed, to hold that each of the descendants of the 1886 Mdewakantons obtained a small, undivided ownership right in each of the properties purchased with the Appropriations Acts funds – the right that the plaintiffs' theory of this case suggests they are entitled to – would have defeated the purpose of the original legislation by making it difficult, if not impossible, to maintain the practice of assigning the relatively small plots of the 1886 lands by assigning the plots sequentially to successor assignees. The purpose of the legislation

was to provide plots large enough for residential and agricultural purposes, and the assignment practice was designed to keep those plots intact, not to continue subdividing them as the number of descendants grew or to force their sale in order to distribute the sale proceeds among numerous competing claimants.

The fact that the Secretary adopted a policy of assigning plots of the 1886 lands to the descendants of the 1886 Mdewakantons does not conflict with the government's position that the descendants of the 1886 Mdewakantons did not hold equitable title to the 1886 lands. To the contrary, as we discuss below, the evidence as to the policy and practice of the Interior Department with regard to the 1886 lands over the years demonstrates that the Department did not regard the 1886 Mdewakantons and their descendants as the beneficial owners of those lands.

B

In the years immediately following the Appropriations Acts, the Interior Department began assigning parcels of the 1886 lands to individual Mdewakantons. As early as 1889, the Secretary of the Interior set forth the Department's policy with respect to the beneficiaries' rights in the assigned properties. In a letter to the Commissioner of Indian Affairs, the Secretary instructed that after appropriate purchases of land had been made and the particular qualifying beneficiaries selected, the plots should be assigned "with a form certificate of

occupancy." The Secretary envisioned that the certificate would provide that the assignee was being awarded the use of the land with title being reserved in the United States. The Secretary added that a patent to the land might be issued "with such limitations as shall be required by law, at such time hereafter as shall be authorized by the statutes." Thus, the Secretary concluded that the issue of "further conveyance thereof to the Indians" would be left "subject to such further determination as may be authorized by law." By that means, the Secretary noted, "the Indians will not be able to dispose of or incumber [sic] said lands, and title can be withheld from those, if any, who fail to occupy and make proper use of the portion assigned to them." With the question of the ultimate ownership of the lands left subject to later legislative action, for the time being all that was to be conveyed to the 1886 Mdewakantons was a temporary right of occupancy.[6]

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[6] Based on an 1899 letter from the Acting Commissioner of the Office of Indian Affairs, which refers to the 1886 lands as being "held in trust for [the 1886 Mdewakantons]," the plaintiffs argue that the Interior Department recognized from the outset that the Appropriations Acts create a trust relationship with the 1886 Mdewakantons. The 1899 letter, however, is entirely consistent with the Secretary's earlier articulated policy and does not support the plaintiffs' contention that the 1886 Mdewakantons had obtained a vested interest in the 1886 lands. The letter does not suggest that the beneficiaries of the Appropriations Acts enjoyed equitable ownership of the lands or any interest other than the right of occupancy and use. To the contrary, the letter stated, in accordance with the Secretary's 1889

(Continued on following page)

That remained the policy of the Interior Department throughout the period between 1888 and 1980. According to a 1904 report, most of the purchased lands had already been assigned to individual qualifying Mdewakantons, although the early assignments were not documented by certificates as the Secretary had instructed. By the early part of the twentieth century the lands that had been purchased with the Appropriations Acts funds had been divided into 89 parcels and had been assigned to selected individuals from among the 1886 Mdewakantons.

Beginning in 1905, the Department formalized the assignments through documents known as Indian Land Certificates. Those documents authorized each assignee to reside on or use the land either for his lifetime or until he abandoned the land. When a particular assignment ended, either by the death of the assignee or when the assignee abandoned the land or otherwise violated the terms of the assignment, the Interior Department would select another assignee for the plot in question. Frequently, the Interior Department would assign a plot to the child of the previous assignee, but sometimes another descendant of the 1886 Mdewakantons would be

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letter, that "the title to all the land purchased [by an Interior Department agent under the Appropriations Acts] is still vested in the United States . . . and that in all probability steps will be taken at an early day looking to the allotment of said lands by the Department to such Indians as the late Agent has designated."

given the assignment. In some instances, the lands were leased to persons other than the descendants of the 1886 Mdewakantons, in which cases the lease proceeds were kept in an account for the 1886 Mdewakantons and their descendants.

The Indian Land Certificates that were issued to document the assignment of the 1886 lands stated that the property was held "in trust, by the Secretary of the Interior, for the exclusive use and benefit of the said Indian, so long as said allottee or his or her heirs occupy and use said land."[7] In the event that the beneficiary should abandon the land, the certificates provided that the land would be "subject to assignment by the Secretary of the Interior to some other Indian who was a resident of Minnesota May 20, 1886, or a legal descendant of such resident Indian." The trial court concluded that the language of those certificates supports the interpretation of the Appropriations Acts as dictating that the 1886 lands were to be held in trust for the 1886 Mdewakantons and their descendants as trust beneficiaries, and that the beneficiaries were accorded equitable ownership rights in the 1886 lands. *Wolfchild I,* 62 Fed.Cl. at 541-42; *Wolfchild II,* 68 Fed.Cl. at 791.

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[7] Some of the later-issued certificates, which are included in the record, omitted the use of the term "trust" and instead stated that the assignee "is entitled to immediate possession of the land for his or her lifetime, as long as he or she shall occupy and use the land," with the assignment being nontransferable and subject to cancellation if the assignee ceased to use and occupy the property as his or her principal place of residence.

We do not interpret the Indian Land Certificates in that manner. While it is true that the Indian Land Certificates used the term "trust" and referred to the assignee "and [his or her] heirs" as being "entitled to immediate possession of said land," the certificates did not state that they conveyed or reflected the conveyance of vested interests in the assigned lands. Instead, they referred to the conveyed interest as only the right of occupancy and use.

The interpretation of the Indian Land Certificates as conveying only the right of temporary occupancy and use is supported by this court's decision in *Cermak v. Babbitt*, 234 F.3d 1356 (Fed.Cir.2000), another case dealing with the rights of the 1886 Mdewakanton descendants in the 1886 lands. In *Cermak*, we stated that the record "reveals that the Secretary elected to convey only temporary use and occupancy rights to individual Indians and used Indian Land Certificates to effect the assignment of these rights." *Id.* at 1363. Although this court's specific holding in *Cermak* – that the Appropriations Acts did not result in allotments of the 1886 lands under the General Allotment Act – is not squarely dispositive of the argument made by the plaintiffs in this case, the court's conclusion that the 1886 Mdewakantons obtained "only temporary use and occupancy rights" in the 1886 lands provides support for the government's position that the Indian Land Certificates did not convey or document the conveyance of beneficial ownership of the 1886 lands.

The district court in *Cermak v. Norton*, 322 F.Supp.2d 1009 (D.Minn.2004), *aff'd*, 478 F.3d 953 (8th Cir.2007), reached the same conclusion. There, the same plaintiffs again challenged the Interior Department's decision that the assignment of two plots from the 1886 lands to their ancestor, John Cermak, conveyed only a life interest in that property and did not give them rights of inheritance with respect to those lands. The court concluded that the Interior Department's position – that the 1886 land assignees obtained no beneficial interest in the assigned lands – had been consistent and constituted a reasonable interpretation of the pertinent statutes. 322 F.Supp.2d at 1015. The Eighth Circuit affirmed, noting that the Interior Department's longstanding policy had been that the Indian Land Certificates bestowed only a temporary tenancy conditioned on personal occupancy and use, "rather than an ownership interest that the Certificate holder's heirs may inherit." 478 F.3d at 957.

Finally, in administrative adjudications, the Interior Department construed the Indian Land Certificates in the same way. *See Brewer v. Acting Deputy Assistant Sec'y – Indian Affairs*, 10 I.B.I.A. 110 (1982); *In re Estate of Gofas*, Indian Probate No. TC 389S-81, at 41-42 (Interior Office of Hearings and Appeals Oct. 26, 1990) ("despite the ambiguous language contained in the Indian Land Certificate form itself, the Bureau of Indian Affairs and the Department of the Interior have consistently interpreted this document as granting to the certificate holder

only a right of use and occupancy for life, subject to the conditions contained therein"). The Indian Land Certificates therefore do not establish that the assignees who held those certificates were trust beneficiaries who owned a beneficial interest in the 1866 lands.

C

In addition to relying on the text of the Indian Land Certificates, the plaintiffs point to various statements by Interior Department officials in which those officials referred to the relationship between the government and the 1886 Mdewakantons as having the character of a trust. It is true that there is some variation in the way that Interior Department officials have characterized that relationship over the years. As we have noted, however, the label given to the relationship is not as important as the substance of the respective parties' rights. And as to that issue, the Interior Department's position has been consistent: The 1886 Mdewakantons and their descendants were eligible for assignments conveying temporary use and occupancy rights in the land, but they did not obtain vested rights that reflected beneficial ownership interests in the property.

In 1915, the Interior Department was forced to address the issue of the nature of the rights attendant to the assignments of the 1886 lands. That issue came to a head as a result of several inquiries concerning whether the assignments of portions of

the 1886 lands gave rise to an inheritable interest in the assigned plots. In one case, the original assignee occupied a small plot until his death. If the assignment were deemed a vested and inheritable interest, the plot would be divided among his three heirs. After some internal debate, the Interior Department concluded that the assignments did not create vested inheritable rights, that both legal and equitable title are in the United States, and that the Secretary of the Interior could select a successor assignee rather than being bound to dispose of the property in accordance with the laws of inheritance.

The position taken by the Interior Department in 1915 as to the ownership status of the 1886 lands is reflected in two memorandums signed off on by the Assistant Secretary. The first memorandum set forth the Department's position that the assignees of the 1886 lands "possessed no other title than a right of occupation of the lands involved, and, therefore, possessed no interest in said lands which was of the nature of an estate of inheritance." Under the Indian Land Certificates, according to the memorandum, the right conferred on the assignees was not a vested right, but was merely a tenancy at will that terminated with the death of the occupant. With respect to the ownership interests in the land, the memorandum stated the following (emphasis added):

> The Secretary of the Interior has not been authorized to hold these lands in trust for the Mdewakanton Sioux. These lands may not be disposed as trust lands. They may not

> be sold with the approval of the Secretary of the Interior, and *both legal and equitable title are in the United States.*

Accordingly, the memorandum concluded, the Secretary was not required to split up a small assigned tract among multiple heirs, but had discretion to assign the tract and could, for example, assign it to the particular heir who had "improved and lived on the tract and is willing to continue to do so."

A second memorandum issued later that year after further internal debate set forth the Department's intention to adhere to its policy of reassigning "the vacant tract in each case to the Mdewakanton Sioux Indian who appears to be most equitably entitled to have the temporary use and occupancy of it." That memorandum concluded that the Appropriations Acts "did not intend to sanction any vesting of a legal interest in these lands by the occupants"; rather, according to the memorandum, Congress intended for the land to be "disposed of in a manner which was deemed best by the Secretary of the Interior, and that he deemed it best not to dispose of any permanent interest in these lands pending further legislation which has not yet been enacted." In light of the fact that many of the tracts were very small – from three to seven acres – the memorandum observed that if the property had to be shared with numerous heirs of the former occupant, "it would result in much confusion and hardship, and practically in an ejectment of the Indian who is most equitably entitled to live on the land, or who may be

actually in possession, living upon it as his only home, and cultivating it to his best advantage." The memorandum noted that in many instances heirs not already living on the property "are amply provided for elsewhere," and many of them had left the area and therefore were not good candidates to continue the occupancy and use of the property.

The second memorandum, like its predecessor, rejected the suggestion that the assignees of land purchased under the Appropriations Acts obtained equitable title to that land. It noted that the preferred approach of making reassignments on equitable grounds rather than as a matter of inheritance had been used for years and had elicited very few complaints. Accordingly, the Department decided to continue reassigning the 1886 lands for temporary use and occupancy "until such time as additional legislation is procured authorizing allotments in severalty on such lands."

In the years following the 1915 policy determination, the Interior Department adhered to its position with respect to the ownership interests in the 1886 lands. For example, in 1933 when a question was raised as to the ownership rights to two of the 1886 tracts, the Department advised that title to the tracts was in the United States, "assignees or their heirs possessing only the right of occupancy and use," and that the lands "are not of an inheritable status." Similarly, in a 1937 decision regarding the reassignment of a tract that was abandoned by the assignee, the Department noted that the 1886 lands "were

purchased for the Indians by the United States. No trust is created in the deeds."

To be sure, the Interior Department has consistently recognized that in the original legislation Congress intended for the appropriated funds to be expended for the benefit of the 1886 Mdewakantons. Consistent with the principle that there is a "general trust relationship between the United States and the Indian people," *United States v. Mitchell,* 463 U.S. 206, 225, 103 S.Ct. 2961, 77 L.Ed.2d 580 (1983), Interior Department officials often characterized the 1886 lands as being held in trust for the 1886 Mdewakantons and their descendants, even though the 1886 Mdewakantons were not a tribe of Indians, but rather were viewed as a group of individuals who had severed their tribal relations and were in need of assistance. The Department made clear, however, that its treatment of the 1886 lands as held in trust status for the 1886 Mdewakanton descendants did not give those beneficiaries any interest other than a potential right of temporary occupancy and use of the lands. And the Department recognized that the lands had been acquired by the United States in fee with no formal trust designation. For example, a 1970 Interior Department memorandum stated that the original legislation authorized the purchase of lands to be used for the benefit of the 1886 Mdewakantons "without trust designation or other limitation in title." The memorandum concluded that in accordance with the original legislative purpose the lands should remain available only for the use of "qualified

Mdewakanton Sioux Indians." To change the status of the lands, it added, "Congress should be asked to permit such action by affirmative legislation."

A 1974 opinion letter from the Solicitor's office at the Interior Department sets forth the most definitive statement of the Department's position as to the legal status of the 1886 lands shortly before the enactment of the 1980 statute. The opinion letter noted that the legal title to the 1886 lands was taken by the United States, that tenancies at will, or defeasible tenancies, were granted in the form of land assignments to members of the beneficiary class (the 1886 Mdewakantons and their descendants), and that in some instances leasehold interests had been granted to non-members of the beneficiary class, with the income being expended for the benefit of reservation communities "in which members of the beneficiary class reside or with which they are affiliated." The opinion letter concluded that the lands were best viewed as being held by the United States in trust, with the Secretary "possessing a special power of appointment among members of a definite class," and having the authority to grant an interest in the form of either a tenancy at will or a defeasible interest in the land. The opinion letter makes clear that its conclusion that the lands were held in trust did not mean that the 1886 Mdewakantons and their descendants owned equitable title to the 1886 lands. To the contrary, the opinion letter stated, "[w]hen the present arrangement was established, indications are that it was intended as a temporary arrangement and

a permanent legislative solution was contemplated." The opinion letter recommended that the Bureau of Indian Affairs "undertake to ascertain whether some legislative disposition of beneficial title to these lands consistent with the present situation is practical and can be recommended to the Congress."

The 1974 memorandum highlighted the point that the key question regarding the rights at issue in this case is not whether the 1886 lands were held "in trust" for the 1886 Mdewakanton descendants to whom they were assigned, but rather what rights were conferred in the assigned lands. Plaintiffs' theory is that the class consisting of the 1886 Mdewakantons and their lineal descendants obtained equitable title to the 1886 lands, such that each of them was legally entitled to a share of the proceeds of those lands. The government's theory is that the 1886 Mdewakantons were merely the intended beneficiaries of a congressional appropriation, and their descendants were merely the beneficiaries of an interim Interior Department policy designed to approximate Congress's purpose in the Appropriations Acts pending legislation settling the ownership issue. We conclude that the latter is the better view in light of the purpose of the Appropriations Acts and the subsequent history pertaining to the administration of the 1886 lands. In so doing, we think it significant that throughout the period between the enactment of the Appropriations Acts and the passage of the 1980 Act that directed that the 1886 lands be held in trust for the three communities, the Interior

Department's consistent position was that the lands were meant to be held in small plots for a small number of individual Mdewakantons living on or near the lands, not collectively for the entire class of Mdewakanton descendants, wherever they might be found.

In sum, we find no persuasive support in the history of the Interior Department's policies with respect to the administration of the 1886 lands that supports the plaintiffs' theory that the Appropriations Acts created permanent beneficial rights in the descendants of the 1886 Mdewakantons. Consistent Interior Department practice was to assign plots of those lands to individuals chosen from among the 1886 Mdewakantons and their descendants, but there was no suggestion in the administrative practice that the beneficiaries obtained equitable title or any other vested rights in those lands.

D

The plaintiffs argue that several twentieth-century statutes show that Congress intended to create a trust relationship with respect to the 1886 lands through which the descendants of the 1886 Mdewakantons obtained an undivided equitable interest in those lands and their proceeds. We conclude that the statutes on which the plaintiffs rely do not support their position.

The plaintiffs first point to a 1901 statute in which Congress authorized the sale of a small parcel

of the 1886 lands in Redwood County, Minnesota, and provided for the purchase of another parcel in exchange. The significance of that legislation, according to the plaintiffs, is that it required "the written consent of the adult Indians residing in Redwood County" before the sale could be effected. *See* Act of Feb. 25, 1901, ch. 474, 31 Stat. 805, 806. Invoking general principles of trust law – in particular the requirement that in some circumstances the consent of the beneficiaries is required to terminate a trust – the plaintiffs contend that the requirement of consent suggests that the property was being held in trust for the Indians. The plaintiffs also rely on the remarks of Senator Pettigrew regarding the legislation, in which he stated that the 1886 Mdewakantons were not a "band of Indians," but "are occupying separate tracts and have the title." 34 Cong. Rec. 2523 (1901).

The statutory requirement to obtain consent for the sale from the adult Indians in Redwood County does not demonstrate the existence of a trust. Instead, it appears simply to reflect congressional recognition that the 1886 lands were intended for the use of the 1886 Mdewakantons and that it was therefore appropriate to afford them the right to object to any proposed disposition of those lands. Indeed, the Senate report on the bill refers to the consent requirement and does not in any way suggest that it is tied to any requirements of trust law. *See* S.Rep. No. 56-2186, at 2 (1901). As for Senator Pettigrew's comment, his statement that the Mdewakantons "have the title" is not supported by

any analysis and is contrary to the position taken by the Secretary of the Interior contemporaneously with the enactment of the Appropriations Acts, as noted above. Absent any other evidence that the Mdewakantons "ha[d] the title" to the 1886 lands, Senator Pettigrew's statement simply appears to be in error.

The plaintiffs argue that subsequent Acts of Congress provide further proof that Congress understood that those lands were held in trust for the Mdewakantons and their descendants. In our view, those statutes provide no support for the plaintiffs' argument, and in fact support the contrary inference.

In 1906, Congress authorized the sale of a small portion of the 1886 lands on the condition that the proceeds of the sale be paid to the current assignees or that the proceeds be used for the purchase of lieu lands elsewhere. Act of Mar. 19, 1906, ch. 962, 34 Stat. 78. Nothing in the text of the statute states or suggests that either the particular assignees who occupied the property at the time or the 1886 Mdewakantons and their descendants in general had an ownership interest in the property. The two reports accompanying the legislation both recited that the land "belongs to the United States," and both added that the land "was at one time intended that it should be allotted to certain Indians, but it has never been so allotted." S.Rep. No. 59-1636, at 1 (1906); H.R.Rep. No. 56-1576, at 1 (1906).

Unlike the 1901 statute, the 1906 statute did not require the consent of the assignees (or anyone else) before effecting the transaction. Thus, whatever force the plaintiffs' argument about the consent requirement might have with respect to the 1901 statute, that argument is not applicable to the 1906 statute. In fact, the absence of any provision for obtaining the consent of any of the 1886 Mdewakantons undermines the plaintiffs' argument that Congress regarded the 1886 Mdewakantons as the equitable owners of the land. Congress's decision to compensate the particular affected assignees by giving them the proceeds from the sale or obtaining lieu lands in exchange for the sold property thus appears to be an effort to minimize the burden of depriving the particular assignees of their temporary use and occupancy of the property, not an acknowledgement that the class of 1886 Mdewakantons and their descendants held an ownership interest in the land.

A statute enacted in 1923 provides further evidence that Congress did not regard the Appropriations Acts as having conferred any ownership rights on the 1886 Mdewakantons and their descendants. In that statute, Act of Feb. 14, 1923, ch. 76, 42 Stat. 1246, Congress extended the provisions of the General Allotment Act of 1887 to the properties purchased with the Appropriations Acts funds, which had the effect of authorizing the Secretary of the Interior to allot the properties to particular individuals from among the 1886 Mdewakantons and their descendants. Significantly, the legislative history of the 1923

Act indicates that the 1886 Mdewakantons were not regarded as having any ownership interest in the property. To the contrary, in the letter recommending enactment of the legislation, the Acting Secretary of the Interior explained that the Appropriations Acts did not specifically indicate the manner in which title would be held to the 1886 properties, and noted that the "United States now holds the title in fee to all those lands." H.R.Rep. No. 67-1379, at 1 (1923). The letter continued, "The legal title to all the above purchased lands, as herein indicated, is in the United States, the Indians having the use and occupancy only." *Id.; see also* S.Rep. No. 67-129, at 1 (1921).

Furthermore, if the 1923 statute had been implemented, the effect would have been to allot the 1886 lands to a small number of the 1886 Mdewakantons – presumably those with assignments at the time. Such a step would have deprived the other members of the class of 1886 Mdewakanton descendants of any present or future interests in the 1886 lands. Accordingly, Congress's decision in 1923 to authorize the allotment of the 1886 lands is contrary to the plaintiffs' contention that they obtained vested rights in those lands through the Appropriations Acts.

Although the 1923 statute authorized the Secretary to make individual allotments of the 1886 lands, the Secretary elected not to do so. In the years following that Act, federal Indian policy changed from favoring individual allotments to supporting tribal self-determination, a policy change that culminated

in the enactment of the Indian Reorganization Act of 1934. It was under the authority of that Act that the three Mdewakanton communities were organized and reservations granted for them.[8]

The effect of that change in policy was manifested in a 1944 statute that authorized the Department of the Interior to purchase two small tracts of the 1886 lands for a Wildlife Refuge. The 1944 statute, Act of June 13, 1944, ch. 243, 58 Stat. 274, stated that the subject properties, which had been acquired pursuant to the Appropriations Acts for Indian use, were "no longer used by Indians." It then provided that as part of the transaction, a total of $1,261.20 would be made available for transfer on the books of the Treasury Department "to the credit of the Medawakanton and Wahpakoota Bands of Sioux Indians" and that the payment "shall operate as a full, complete, and perfect extinguishment of all their right, title, and interest in and to the lands above described." *Id.*

The plaintiffs argue that the payment and the reference to the "right, title, and interest" in the two

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[8] The plaintiffs have called our attention to the Supreme Court's recent decision in *Carcieri v. Salazar*, ___ U.S. ___, 129 S.Ct. 1058, 172 L.Ed.2d 791 (2009), which involved the construction of a provision of the 1934 Act. They contend that *Carcieri* supports their argument that the Appropriations Acts created a trust for the 1886 Mdewakantons and their descendants. We do not regard *Carcieri* as in any way relevant to that issue.

tracts of the 1886 lands indicates that Congress recognized an equitable interest in the 1886 lands. The problem with that argument is that the payment was made to a tribe, not to a group of individuals, and in particular not to the lineal descendants of the 1886 Mdewakantons. Thus, the 1944 statute demonstrates that Congress appreciated that the 1886 lands were purchased for the general purpose of benefiting the 1886 Mdewakantons, and that it was appropriate that some compensation be paid for the disposition of that property. But it is contrary to the conclusion that any particular individuals had obtained vested rights in that property as to which consent or compensation was legally required before the property was sold.

The most significant twentieth-century legislative action bearing on the status of the 1886 lands is, of course, the 1980 statute that terminated the assignment system and placed the 1886 lands in trust for the three communities. That statute and its legislative history make clear that Congress did not regard the Appropriations Acts as having conferred equitable title in the 1886 lands on the 1886 Mdewakantons and their descendants.

The committee reports on the 1980 legislation recognized that the 1886 lands were held by the United States for the use of the 1886 Mdewakantons and their descendants. *See* S.Rep. No. 96-1047, at 1-2 (1980); H.R.Rep. No. 96-1409, at 2 (1980). But the reports did not suggest that the 1886 Mdewakantons, either individually or collectively, held beneficial title to the 1886 lands. To the contrary, as the Senate

report noted, the lands were owned by the United States pursuant to an "unusual" arrangement under which the land was made available for assignment to eligible beneficiaries of the three Appropriations Acts. S.Rep. No. 96-1047, at 2. Because that arrangement did not give vested rights to the land to any of the descendants of the 1886 Mdewakantons, Congress was free to alter the ownership status of the land to create trusts for the three communities.[9] *See N. Cheyenne Tribe v. Hollowbreast,* 425 U.S. 649, 656, 96 S.Ct. 1793, 48 L.Ed.2d 274 (1976); *United States v. Jim,* 409 U.S. 80, 82, 93 S.Ct. 261, 34 L.Ed.2d 282 (1972); *LeBeau v. United States,* 474 F.3d 1334, 1342-43 (Fed.Cir.2007).

It was clear to those who proposed the 1980 legislation that despite the overlap among the descendants of the 1886 Mdewakantons and the membership of the three communities, some of the 1886 Mdewakanton descendants would cease to be beneficiaries under the new statute. An Interior Department memorandum describing the effect of the

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[9] The sponsor of the 1980 Act in the House, Rep. Richard Nolan, explained that under the Appropriations Acts, the 1886 lands were "held by the United States for exclusive use by descendants of the May 20, 1886, Mdewakanton Sioux," unlike the reservation land, which "belonged to all Mdewakanton residing on each reservation, according to membership requirements stipulated by the tribe." 126 Cong. Rec. 8897 (Apr. 23, 1980) (remarks of Rep. Nolan). The 1980 Act, he explained, "will put [the 1886 lands] on an equal status with [reservation] land," and the "change in the legal status of the 1886 Mdewakanton land will place all Mdewakanton lands on an equal basis." *Id.*

proposed transfer of the 1886 lands to be held in trust for the three communities specifically acknowledged that, because of the lack of complete overlap between the membership of the communities and the descendants of the 1886 Mdewakanton, some individuals could lose the opportunity for occupancy and use of those properties under the proposed legislation. The memorandum stated:

> [T]here are, potentially, a number of Indian people who are eligible descendants entitled to use rights in this property but who are not members of any of the three Indian communities and would, therefore, not acquire any rights (they may in fact lose rights) by the proposed change in the title to this property. There is no provision in the Bill to protect any such property rights there may be.

That acknowledgement makes clear that the Interior Department understood that the rights of the Mdewakanton descendants were limited to eligibility for use and occupancy of the 1886 lands, not equitable ownership.[10] In fact, the "savings clause" that preserved occupancy rights for all those then holding

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[10] The plaintiffs argue that the quoted statement was in a document relating to a bill introduced in an earlier Congress. The earlier bill and the Act ultimately passed in 1980, however, were nearly identical. The process of obtaining the 1980 legislation was an ongoing one that simply spanned more than one Congress. The document is therefore properly viewed as part of the legislative history of the 1980 Act.

assignments to portions of the 1886 lands was added to the bill, perhaps in an effort to mitigate the effect of the new statute on those who were not members of the communities and would otherwise lose their current right of occupancy of the 1886 lands.

From our survey of the various statutes enacted in the aftermath of the Appropriations Acts, we see no evidence that Congress interpreted the Appropriations Acts as creating a trust relationship with the 1886 Mdewakantons. Nor do we see any indication that Congress wished, in the subsequent legislation, to convert the relationship between the government and the 1886 Mdewakanton descendants into a trust relationship in which the descendants would be treated as beneficial owners of the 1886 lands.

E

In addition to invoking subsequent legislation and administrative practice, the plaintiffs seek support for their position in several court decisions and in positions taken by government lawyers in previous cases involving the 1886 lands. None of those arguments is persuasive.

First, the plaintiffs and the Lower Sioux Indian Community rely heavily on the Court of Claims' decision in *Duncan v. United States,* 229 Ct.Cl. 120, 667 F.2d 36 (1981). That case involved a series of statutes that authorized the purchase of land for certain Indians in California. The first of those statutes authorized the Secretary of the Interior to

purchase lands and water rights for the use of the designated Indians, to construct suitable irrigation facilities on those lands, and to "fence, survey and mark the boundaries of such Indian Reservations." Act of June 21, 1906, Pub.L. No. 258, ch. 3504, 34 Stat. 325, 333 (1906). Subsequent statutes renewed the authorization in similar terms, and suitable property was purchased with the appropriated funds. In 1958, Congress enacted a statute that provided that the trust relationship with respect to the lands would be terminated under certain conditions and the land turned over to individual Indians. *See* Pub.L. No. 85-671, 72 Stat. 619 (1958). The Indians later filed an action for breach of trust, contending that the government had not satisfied the statutory requirements for termination of the trust. The Court of Claims ruled that the California lands were held in trust for the Indians and that the government was liable for breach of trust because of its unauthorized, premature termination of the trust.

The plaintiffs contend that the land purchases in this case and the purchase at issue in the *Duncan* case are very similar, and that the purchases in this case therefore must be treated as creating the same kind of trust relationship that was found to exist in *Duncan*. While there are some similarities between the two cases, there are important differences that make the *Duncan* case distinguishable. First, the initial statutes in *Duncan* expressly authorized the Secretary to procure land for the creation of "Reservations" for the Indians, a term that is typically

associated with the creation of a trust relationship between the government and the tribe or community of Indians for which the reservation is created. *See Cohen's Handbook of Federal Indian Law* §§ 3.04[2][c], at 191; 15.04[3][b], at 982; *see also N. Paiute Nation v. United States,* 8 Cl.Ct. 470, 485 (1985). Second, as the *Duncan* court pointed out, the "contemporaneous and continuing interpretation" of the authorizing statutes by the Interior Department was that those statutes created a trust relationship. In fact, the parties' agreed statement of facts contained a stipulation that from the time of the creation of the reservation until its termination, "the Secretary of the Interior recognized a federal trust relationship with the Robinson or East Lake Band, as a distinct Indian tribe or band of Indians." 667 F.2d at 41 n. 7. Third, in the 1958 statute that authorized the termination of the reservation, Congress clearly stated its understanding and intention that the reservation lands in question had been and would continue to be held in trust until final termination. *See* Pub.L. No. 85-671, § 9, 72 Stat. at 621 (providing for certain benefits to be conferred "[p]rior to the termination of the Federal trust relationship in accordance with the provisions of this Act").

None of those factors is present here. The Appropriations Acts did not create a reservation for the 1886 Mdewakantons; there was no consistent and longstanding position by the Interior Department that the Appropriations Acts created a trust giving the descendants of the 1886 Mdewakantons vested

rights in the 1886 lands; and the 1980 statute that terminated the relationship created by the Appropriations Acts not only did not refer to that relationship as a trust relationship, but created an entirely different, and inconsistent, trust relationship with the three Mdewakanton communities. *Duncan* therefore does not control this case.

The plaintiffs also rely on a 1922 decision by the Court of Claims, *Medawakanton and Wahpakoota Bands of Sioux Indians v. United States,* 57 Ct.Cl. 357 (1922). That case arose after Congress enacted a statute in 1917 directing that the Sioux be awarded a back payment for the annuities that had been revoked by the 1863 legislation. Act of Mar. 4, 1917, ch. 181, 39 Stat. 1195. The 1917 statute directed that the amount of the back payment be reduced by any amounts that had been paid to the tribe and tribal members for their support in the interim. Among the set-off payments were the payments made pursuant to the Appropriations Acts. Nothing in that legislation or the court's judgment indicates that the monies were paid as part of a trust; they were simply funds that were previously paid to the tribe and to former tribe members and, as such, fell within the scope of what Congress had directed to be set off from the overall judgment in that litigation.

Finally, the plaintiffs argue that the government is estopped from denying that the Appropriations Acts created a trust relationship with the 1886 Mdewakantons and their descendants because government attorneys have acknowledged the existence

of such a trust in earlier litigation. We have examined the statements relied on by the plaintiffs and do not find anything said by the government attorneys in the referenced cases that would support the plaintiffs' claims in this one. In one instance, the government noted that the Indian Land Certificates documenting the assignments held by particular descendants of the 1886 Mdewakantons referred to the assigned land as "held in trust." Government counsel then stated that the 1980 legislation "changed the status of property represented by Indian Land Certificates" by transferring "property that the United States had held in trust for individual Mdewakanton Sioux, to the Sioux Community." In other instances, again referring to the Indian Land Certificates, government counsel stated the assigned lands were held in trust for individual Mdewakanton Sioux. That characterization of the property relationship reflected by each assignment is consistent with the way the Interior Department frequently characterized the assignments, but it falls far short of endorsing the plaintiffs' position that the United States held the 1886 lands in trust for the class of the 1886 Mdewakanton descendants and that the trust relationship rendered the members of that class equitable owners of those lands.

In another instance cited by the plaintiffs, a government attorney stated that the 1980 law "said we're not changing anybody's existing rights." In context, it is clear that the attorney's statement referred to the effect of the savings clause of the 1980 Act in

preserving the rights of existing assignees, not to the overall effect of the Act in giving beneficial title to the three communities.

In sum, we conclude that, as of the time of the 1980 Act, all indications were that neither Congress nor the Department of the Interior had conveyed any vested ownership rights in the 1886 lands, legal or equitable, to anyone. Instead, those lands were being held by the Department of the Interior for use by the 1886 Mdewakantons and their descendants pending an ultimate legislative determination as to how the ownership interests in the lands should be allocated. That determination came in 1980, when Congress provided that legal title in the lands would be held by the United States, which would hold the lands in trust for the three communities. For that reason, we conclude that the answer to the first of the certified questions in this case – whether the Appropriations Acts created a trust for the benefit of the 1886 Mdewakantons and their descendants – is no.

III

The second certified question asks whether the 1980 Act terminated any trust created by the Appropriations Acts.

Congress's purpose in the 1980 statute was to alter the ownership status of the 1886 lands. What Congress plainly sought to achieve was to have the United States' interest in the lands converted into a trust for the three communities, whereby the United

States would hold legal title to the lands and each of the three communities would hold equitable title to the portions of the 1886 lands allocated to it. The operative language of the statute makes that purpose plain. It states, in pertinent part, as follows:

> That all right, title, and interest of the United States in [the 1886 lands] which were acquired and are now held by the United States for the use or benefit of certain Mdewakanton Sioux Indians [under the Appropriations Acts] are hereby declared to hereafter be held by the United States –
>
> (1) with respect to the some 258.25 acres of such lands located within Scott County, Minnesota, in trust for the Shakopee Mdewakanton Sioux Community of Minnesota;
>
> (2) with respect to the some 572.5 acres of such lands located within Redwood County, Minnesota, in trust for the Lower Sioux Indian Community of Minnesota; and
>
> (3) with respect to the some 120 acres of such lands located in Goodhue County, Minnesota, in trust for the Prairie Island Indian Community of Minnesota.
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> . . . .
>
> . . . The lands so transferred are hereby declared to be a part of the reservations of the respective Indian communities for which they are held in trust by the United States.

94 Stat. at 3262.

The trial court construed that statute as creating a trust in favor of the three communities and in turn requiring the three communities to hold the 1886 lands in trust for the 1886 Mdewakantons. The court further held that as of the time of the 1980 Act, the United States held only legal title to the 1886 lands, and the descendants of the 1886 Mdewakantons held equitable title. Therefore, the court concluded, when the 1980 Act transferred all the United States' right, title, and interest in the land, it transferred only legal title to the lands, and the descendants of the 1886 Mdewakantons continued to hold equitable title. *Wolfchild I,* 62 Fed.Cl. at 543. The plaintiffs agree with that construction of the statute and contend that they all share beneficial ownership of the 1980 lands in the form of an undivided equitable interest in the disputed property.

The main problem with the plaintiffs' theory is that if their interpretation of the 1980 Act is correct, it is hard to understand what the 1980 Act accomplished. At the time the 1980 Act was enacted, the United States already held legal title to the 1886 lands. According to the plaintiffs, they enjoyed beneficial ownership of the 1886 lands both before and after the 1980 Act, so the Act did not affect their interests in the 1886 lands. Moreover, in the plaintiffs' view the Act did not give the three Mdewakanton communities equitable title to those lands or, so far as we can discern, any other interest in the property. The plaintiffs suggest that although the Act declared that the United States would

henceforth hold the 1886 lands in trust for the three communities, the intended effect of the Act was to require the communities in turn to hold that property in trust for the descendants of the 1886 Mdewakantons, who would therefore hold equitable title to those lands. As a result, the communities, although explicitly designated in the Act as trust beneficiaries, would instead become trustees with regard to the property, even though they held no legal or equitable interest in that property.

The plaintiffs argue that their construction would not render the 1980 Act meaningless, because the 1980 Act rendered the lands subject to the communities' political jurisdiction and eligible for encumbrance with long-term leases. But the plaintiffs do not explain what practical impact it would have on the communities for the lands to be "subject to the communities' political jurisdiction" if legal title remained in the United States and equitable title remained in the 1886 Mdewakanton descendants. Moreover, as was explained in contemporaneous Interior Department documents, the availability of the lands for leasing under pertinent regulations depended on the lands being tribally owned. The Interior Department regarded the current status of the lands as barring such leasing. The plaintiffs have not shown how, under their construction of the 1980 Act, the pre-1980 "unusual ownership status of the land," which interfered with issuing long-term leases, *see* S.Rep. No. 96-1047, at 6; H.R.Rep. No. 96-1409, at

6, would change in a fundamental way that would affect the eligibility of the land for leasing.[11]

The trial court recognized the awkwardness of the plaintiffs' construction of the 1980 Act, noting that under that construction the Act appeared "to create a trust on a trust." The court, however, concluded that the task of sorting out the precise interests of the parties following the 1980 Act "must be remitted to exploration in future proceedings." *Wolfchild I,* 62 Fed.Cl. at 544 n. 13.[12] The problem arose, according to the court, because the 1980 Act "is so poorly drafted that it is difficult to make sense of its provisions." *Id.* To the contrary, we conclude that the Act is difficult to understand only if it is viewed in the way the plaintiffs view it – as intended to

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[11] The plaintiffs suggest in passing that the status of the lands as "reservation" lands under the 1980 Act could "possibly" qualify those lands for leasing under the pertinent regulations. Yet it is the 1980 Act's reference to the conversion of the lands to "reservation" status that is most problematic for the plaintiffs' theory that the 1980 Act left their interests in the 1886 lands unaffected.

[12] In a later opinion, the court characterized the 1980 Act as having "created an overlay on the earlier trust" and that the government's post-1980 transfer of lands, monies, and other property to the communities made those communities "agents of the federal government in administering the trust on behalf of the trust beneficiaries." *Wolfchild v. United States,* 72 Fed.Cl. 511, 528-29 (2006). While Congress could certainly devise such an arrangement, we see nothing in the 1980 Act that establishes it, and assigning the communities the role of fiduciary agents is at odds with the statutory language that designates them as trust beneficiaries.

preserve equitable title to the disputed lands in the 1886 Mdewakanton descendants. If the Act is viewed as creating a trust in which legal title is held by the United States and beneficial title is held by the three communities, the wording of the Act achieves that purpose clearly and simply.

Nothing in the very straightforward language of the statute (and nothing in any of the legislative history) suggests that Congress intended to create a "trust on a trust" or any other elaborate structure in which the three communities would assume some undefined role between the continuing holder of legal title (the United States) and what the plaintiffs see as the continuing holders of equitable title (the 1886 Mdewakanton descendants). Under the plaintiffs' construction of the statute, the three communities would be designated as trust beneficiaries, but would hold no beneficial interest as a result of the trust. Instead, according to the trial court, the three communities "have assumed a fiduciary role as agents of the United States . . . in administering the trust on behalf of the trust beneficiaries." *Wolfchild v. United States,* 72 Fed.Cl. 511, 529 (2006). Yet the statutory characterization of the land as being held "for the benefit of" the three communities is not consistent with the rights and obligations of the communities under the plaintiffs' theory or the court's construction. In addition, under the plaintiffs' theory the expressed purposes of the 1980 Act would not be served, as the problem of the two classes of property and the two classes of Mdewakantons would persist, even though

eliminating those two classes of property and holders of property rights was a principal objective of the statute.

A further problem with the trial court's interpretation of the 1980 Act is that it is in tension with the provision in the Act that declares the transferred 1886 lands to be "part of the reservations of the respective Indian communities." 94 Stat. at 3262. As previously noted, the term "reservation" typically denotes property for which legal title is in the United States and equitable title is in the tribe. Lands that the Secretary adds to existing reservations are designated by statute as reserved "for the exclusive use of Indians entitled to enrollment or by tribal membership to residence at such reservations." 25 U.S.C. § 467. In light of that statutory provision dedicating new reservation lands to the use of tribal members only, it would be anomalous to construe the 1980 Act, which made the 1886 lands part of the three communities' reservations, to mean that those lands would be held in trust for the class of 1886 Mdewakanton descendants, many of whom were not enrolled or eligible for enrollment in any of the three communities.

For the foregoing reasons, even if we construed the Appropriations Acts as creating a trust relationship by implication or by operation of law, we would hold that the 1980 Act terminated that trust. If the Appropriations Acts created a trust for a class consisting of the 1886 Mdewakantons and their descendants, the relationship between the government

and the beneficiary class would be akin to the relationship between the government and individual members of a tribe with respect to reservation lands. And as to that relationship, the Supreme Court has held that Congress can freely alter the terms of any provision relating to the distribution of Indian lands at any point prior to the time those interests are allotted or individuals otherwise obtain vested rights in the property. *See United States v. Jim,* 409 U.S. 80, 82, 93 S.Ct. 261, 34 L.Ed.2d 282 (1972) (Congress may alter the distribution scheme of an earlier statute that created a trust relationship with a tribe); *Sizemore v. Brady,* 235 U.S. 441, 449, 35 S.Ct. 135, 59 L.Ed. 308 (1914); *Gritts v. Fisher,* 224 U.S. 640, 648, 32 S.Ct. 580, 56 L.Ed. 928 (1912). Congress's decision to give the three Mdewakanton communities beneficial ownership rights in the 1886 lands, rather than continuing to hold those lands for the use and benefit of the 1886 Mdewakanton descendants, would therefore be within Congress's power over such property, even if that action were taken over the objection of the original beneficiaries. Because a change in the identity of the beneficiaries does not constitute a taking of property from individuals who had an expectation of benefit but no vested rights in the property, there is no force to the plaintiffs' argument that if Congress had intended to confer beneficial title to the 1886 lands on the three communities, it would have provided compensation to the 1886 Mdewakanton descendants under the takings clause of the Fifth Amendment.

The trial court made two points in support of its conclusion that the 1980 Act did not terminate the trust created by the Appropriations Acts, but we do not find either of those points persuasive.

First, the court noted that the 1980 Act did not contain express language terminating a trust. Because the Appropriations Acts contained no express language creating a trust, however, it is not surprising that the 1980 Act contained no express language of termination. Even if the Appropriations Acts are regarded as having imposed sufficiently specific duties on the Secretary of the Interior to give rise to a trust relationship with the 1886 Mdewakantons, a trust was, at most, created only by operation of law. Under those circumstances, Congress's failure to include express language of trust termination cannot be regarded as indicative of an intention not to alter the previous legal relationship among the parties.[13]

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[13] A similar point applies to the trial court's conclusion that construing the 1980 Act to transfer the 1886 lands in trust to the three communities constitutes an implied repeal of the Appropriations Acts, and that the government's construction of the 1980 Act is therefore suspect in light of the doctrine that implied repeals are disfavored. *See Wolfchild I*, 62 Fed.Cl. at 543-44. We do not agree that the 1980 Act, as construed by the government, would effect a repeal of the Appropriations Acts, implied or otherwise. The 1980 Act simply provides for the long-term disposition of the property purchased pursuant to the Appropriations Acts, an issue left unresolved by Congress both in those Acts and during the ensuing 90 years.

Second, the court found significance in the savings clause of the 1980 Act, which stated that nothing in the Act shall "alter, or require the alteration, of any rights under any contract, lease, or assignment entered into or issued prior to enactment." Those provisions, according to the court, indicated that the 1980 Act did not terminate the pre-existing trust. In fact, however, those provisions merely demonstrate that Congress did not intend for the new statute to undermine any current interests represented by existing assignments or contracts. *See Brewer v. Acting Deputy Assistant Sec'y – Indian Affairs,* 10 I.B.I.A. 110, 120 (1982) (acknowledging that assignees have a property interest protected by the savings clause).

Thus, assignees under existing Indian Land Certificates were allowed to remain in occupancy, but no further certificates were to be issued to successor assignees after the death of the assignees or other termination of the current assignments. Likewise, the 1980 Act did not terminate any rights associated with current leases on portions of the 1886 lands. But that does not demonstrate that the 1980 Act made no change that affected the interests of those who might have expected land assignments or other benefits in the future.

In fact, the presence of the savings clause in the 1980 Act provides affirmative evidence in favor of the government's interpretation of that statute. If the 1980 Act had no effect on the equitable rights of the 1886 Mdewakantons in the 1886 lands, as the

plaintiffs contend, there would have been no need for a savings clause to preserve the interests of the current assignment holders from the adverse effects of the 1980 legislation. The fact that the savings clause was regarded as necessary to protect the current assignees is a clear indication that the drafters viewed the Act as otherwise terminating any equitable interests of the 1886 Mdewakantons in those lands.

Significantly, the Department of the Interior, which had drafted the 1980 Act, made clear shortly after the date of enactment that it construed the Act as creating a trust in favor of the three communities and not granting or preserving beneficial ownership rights in the 1886 Mdewakanton descendants. A letter sent to the Lower Sioux Community Council by the Interior Department's Area Director within days of the enactment of the 1980 Act expressed the Department's position that the Act "gives jurisdiction to each Community Council on the same basis as other tribally-owned land," and that, as a result, "the income derived from these lands in the future will be utilized as other income from tribal land."

Similarly, in administrative proceedings following the 1980 Act, the Department made clear that, with the exception of those persons affected by the savings clause, it interpreted the 1980 Act as terminating any interest of the 1886 Mdewakanton descendants in the 1886 lands and instead created a trust relationship with the three communities. *See Gitchel v. Minneapolis Area Dir., Bureau of Indian*

Affairs, 28 I.B.I.A. 46, 48 (1995) ("[T]here is simply no question as to the intent of Congress in 1980 to convey the beneficial title to these lands to the Communit[ies]."); *Brewer,* 10 I.B.I.A. at 118-19 ("[t]he Department's position concerning these lands has . . . consistently been that they were not made available by Congress for allotment, were never allotted, and were therefore available in 1980 to become tribal lands held by the Department in trust. Congress approved this position when it adopted the 1980 Act."); *In re Estate of Gofas,* Indian Probate No. TC 389S-81, at 34 (Interior Office of Hearings and Appeals Oct. 29, 1990) (1980 Act declared title to Scott County lands to be vested in the United States "in trust for the Shakopee Mdewakanton Sioux community").

The view of the agency as to the proper construction of the statute is particularly pertinent in a case such as this one, in which the agency drafted the legislation in question, was deeply involved in its enactment, and attached the pertinent construction to the statute roughly contemporaneously with its passage. *See Lindahl v. Office of Pers. Mgmt.,* 470 U.S. 768, 788, 105 S.Ct. 1620, 84 L.Ed.2d 674 (1985); *Sec. & Exch. Comm'n v. Sloan,* 436 U.S. 103, 120, 98 S.Ct. 1702, 56 L.Ed.2d 148 (1978); *Zuber v. Allen,* 396 U.S. 168, 192, 90 S.Ct. 314, 24 L.Ed.2d 345 (1969). The proper construction of the 1980 Act is thus confirmed by the clear interpretation of that statute

within the agency that proposed, drafted, and supported the legislation.[14]

For these reasons, we conclude that the answer to the second of the certified questions in this case –

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[14] The parties devote some attention to the question whether it was lawful for the Interior Department, following the 1980 Act, to transfer to the three communities approximately $60,000 in funds that had been collected as proceeds from the sale, use, or leasing of certain of the 1886 lands, given that the 1980 Act was silent as to the disposition of those funds. *See Wolfchild I*, 62 Fed.Cl. at 549-50. That issue does not affect our analysis of the two certified questions, however, and we leave that issue to be addressed, to the extent necessary, in further proceedings before the trial court.

The parties also engage in a debate over whether the trial court ruled that Congress's enactment of the 1980 Act itself constituted a breach of trust. The suggestion that the court so ruled is based on a passing statement in a later opinion in which the court remarked that the "United States breached the trust engendered by the Appropriations Acts through the passage of the 1980 Act and other actions taken thereafter." *Wolfchild v. United States*, 78 Fed.Cl. 472, 475 (2007). The plaintiffs contend that the court's remark should not be understood as suggesting that the legislation itself constituted a breach of trust, but "is a reference to the passing of time prior to the 1980 Act and not to 'the passage' of the 1980 Act." Whatever may be the proper reading of that statement by the trial court, it was not part of the court's main opinion on this issue, and in any event it is clear that an Act of Congress cannot constitute a breach of trust for which relief can be obtained from the Court of Federal Claims. *See Menominee Tribe of Indians v. United States*, 221 Ct.Cl. 506, 607 F.2d 1335, 1339, 1344-45 (1979).

whether Congress, through the enactment of the 1980 Act, terminated any trust created by the Appropriations Acts – is yes.

In light of our disposition of the two certified questions, we reverse and remand for further proceedings in the trial court.

Each party shall bear its own costs for this appeal.

REVERSED and REMANDED.

78 Fed.Cl. 472

United States Court of Federal Claims.
Sheldon Peters WOLFCHILD, et al., Plaintiffs,
v.
UNITED STATES, Defendant.
Nos. 03-2684L, 01-568L.

Sept. 26, 2007.

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OPINION AND ORDER

LETTOW, Judge.

This Indian trust case has been brought by approximately 20,750 individuals claiming descent from persons who were members of the Mdewakanton band of Sioux Indians and who assisted white settlers in Minnesota during the 1862 Sioux uprising ("the loyal Mdewakanton"). *See Wolfchild v. United States*, 62 Fed.Cl. 521, 526-29 (2004) ("*Wolfchild I*") (describing the 1862 Sioux uprising, the role of the loyal Mdewakanton, and their severance of tribal relations after the uprising).[1] Promptly after this suit was filed in November 2003, the court addressed the nature and viability of the Indian trust claims, in due course granting a motion by plaintiffs for a partial summary judgment that (1) a trust, which included land, improvements to land, and monies as the corpus, was created in connection with, and as a result of, provisions in appropriation acts for the Department of the Interior in 1888, 1889, and 1890 ("Appropriation Acts")[2] that provided money to be expended under

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[1] The lineal descendants of the loyal Mdewakanton constitute an "identifiable group of American Indians" within the meaning of the Indian Tucker Act, 28 U.S.C. § 1505, and accordingly this is a collective action under that Act.

[2] The three Appropriation Acts are the Act of June 29, 1888, ch. 503, 25 Stat. 217, 228-29; the Act of Mar. 2, 1889, ch. 412, 25

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specific directions for the benefit of the loyal Mdewakanton and their descendants,[3] (2) such trust

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Stat. 980, 992-93; and the Act of Aug. 19, 1890, ch. 807, 26 Stat. 336, 349.

[3] The initial trust beneficiaries were defined in the Appropriation Acts as "Indians in Minnesota, belonging to the Medwakanton [sic] band of Sioux Indians, who have resided in said State since [May 20, 1886] . . . and severed their tribal relations." Act of June 29, 1888, 25 Stat. at 228; *accord* Act of Mar. 2, 1889, 25 Stat. at 992; Act of Aug. 19, 1890, 26 Stat. at 349. These Indians had been loyal to the United States during the Sioux uprising, which began in Minnesota in August 1862 and claimed the lives of more than 500 white settlers and numerous Indians. *See Wolfchild I,* 62 Fed.Cl. at 526. By aiding the white settlers, many of the loyal Indians lost their homes and property, and Congress concluded that their lives would be in danger were they to return to their tribes. *Id.* (quoting *Cong. Globe,* 38th Cong., 1st Sess. 3516 (1864)).

> The explicit statutory definitional reference to Indians "who have resided in said State since . . . [May 20, 1886]" was to a census prepared by U.S. Special Agent Walter McLeod, who determined on behalf of the Commissioner of Indian Affairs which Mdewakanton Indians (1) were loyal to the United States during the 1862 uprising, (2) had renounced their tribal relations, and (3) had remained in Minnesota. *See Wolfchild I,* 62 Fed.Cl. at 528.
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> Under the 1889 and 1890 Appropriations Acts, the beneficiaries included both the loyal Mdewakanton and their families. Act of Mar. 2, 1889, 25 Stat. at 992 (monies to be appropriated for "these Indians or family thereof"); Act of Aug. 19, 1890, 26 Stat. at 349 (monies to be appropriated for "these Indians or families thereof"). The Appropriation Acts were intended as a substantial addendum to an act adopted in 1863 for the benefit of "individual[s] of the before-named bands [Sisseton, Wahpaton, Mdewakanton, and Wahpakoota]

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was neither extinguished nor terminated by the Act of December 19, 1980, Pub.L. No. 96-557, 94 Stat. 3262 (the "1980 Act"), which converted interests of the United States in the property at issue to a holding in trust for three Indian communities located in Minnesota,[4] and (3) the United States breached the trust engendered by the Appropriation Acts through the passage of the 1980 Act and other actions taken thereafter. *See Wolfchild I,* 62 Fed.Cl. at 555.[5]

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who exerted [them]sel[ves] in rescuing the whites from the late massacre [by] said Indians." Act of Feb. 16, 1863, § 9, 12 Stat. 652, 654. *See Wolfchild I,* 62 Fed.Cl. at 526. The 1863 Act specified that the land addressed by that Act "shall be an inheritance to said Indians and their heirs forever." 12 Stat. at 654. This prior statutory text illuminates the reference to "families" in the later Appropriation Acts.

[4] The three Indian communities are the Lower Sioux Indian Community, the Shakopee Mdewakanton Sioux (Dakota) Community, and the Prairie Island Indian Community in Minnesota. Pub.L. No. 96-557, 94 Stat. at 3262.

[5] Plaintiffs also put forward contractual claims that were dismissed because of the six-year statute of limitations applicable to claims brought under the Tucker Act, but their trust claims had been preserved by the Indian Trust Accounting Statute. *Wolfchild I,* 62 Fed.Cl. at 547-49; *see* Department of the Interior and Related Agencies Appropriations Act, 2004, Pub.L. No. 108-108, 117 Stat. 1241, 1263 (2003). The Indian Trust Accounting Statute, with minor variations, has been enacted for fiscal years 1991 to 2006 as part of the annual appropriations statute for the Department of the Interior. It provides that the statute of limitations for claims alleging mismanagement or loss of Indian trust funds shall not begin to run until the beneficiaries have been given an accounting. *See* Pub.L. No. 108-108, 117 Stat. at 1263 (fiscal year 2004 version);

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Thereafter, over a period of two and one-half years, the court considered and resolved numerous party-related issues that arose in this collective action. *See Wolfchild v. United States,* 68 Fed.Cl. 779 (2005) (*"Wolfchild II"*); *Wolfchild v. United States,* 72 Fed.Cl. 511 (2006) (*"Wolfchild III"*); *Wolfchild v. United States,* 77 Fed.Cl. 22 (2007) (*"Wolfchild IV"*). Among other things, the court granted plaintiffs' request for authorization to inform prospective plaintiffs of the pendency of this action, *Wolfchild II,* 68 Fed.Cl. at 785-87, 801, requiring plaintiffs to send personal notice to all lineal descendants of the loyal Mdewakanton whose names and addresses were known and who had not already joined in the action, and to publish notice in newspapers and periodicals that had wide circulation in Minnesota or among Native Americans. *Id.* at 801, 804-805; *Wolfchild III,* 72 Fed.Cl. at 516.[6] Subsequently, plaintiffs were granted leave to file a Third Amended Complaint to add thousands of additional plaintiffs, and thousands of other individuals, making up 41 separate groups,

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accord Department of the Interior, Environment, and Related Agencies Appropriation Act, 2006, Pub.L. No. 109-54, 119 Stat. 499, 519 (2005) (fiscal year 2006 version); *see also Shoshone Indian Tribe of Wind River Reservation v. United States,* 364 F.3d 1339, 1347 (Fed.Cir.2004); *Wolfchild I,* 62 Fed.Cl. at 534-535 & n. 10.

[6] To aid in providing notice to potentially interested persons, and pursuant to the "Call Statute," 28 U.S.C. § 2507, the court also required the government to provide a listing of those lineal descendants known to the government. *Wolfchild II,* 68 Fed.Cl. at 797-98.

were granted intervention as plaintiffs. *Wolfchild III,* 72 Fed.Cl. at 514, 539-40; *Wolfchild IV,* 77 Fed.Cl. at 31-36. The court also granted a motion by the Lower Sioux Indian Community ("Lower Sioux") for leave to intervene as a plaintiff. *Wolfchild III,* 72 Fed.Cl. at 514, 540. Third-party summonses were issued to the Prairie Island and Shakopee Indian Communities to bring those Communities into the case as defendants, but those summonses were quashed because the redressability criterion for standing under Article III of the Constitution was not satisfied as to those communities. *Wolfchild IV,* 77 Fed.Cl. at 27-31.

At this juncture, both the court and most of the parties are ready to proceed with discovery and other steps to prepare the case for resolution.[7] The parties

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[7] In *Wolfchild IV,* the court identified the following issues as requiring development prior to resolution of the case:

> (1) delineating the trust created by the 1888, 1889, and 1890 Appropriation Acts, (2) accounting for the [handling of the] trust corpus by the Department of the Interior and its agents after enactment of the 1980 Act, (3) addressing the current legal status of the 1886 lands, (4) explicating and applying the criteria for determining whether a plaintiff or intervening plaintiff qualifies as a lineal descendant of a loyal Mdewakanton and thus a beneficiary of the trust, and (5) determining the monetary relief to which individual claimants might be entitled.

77 Fed.Cl. at 36. Notwithstanding this recitation of issues, the litigation now might be distilled down to three fundamental questions: "what property is involved," "what's happened to that property," and

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have proposed several variants of a plan and schedule for these steps. However, the government has interposed a motion to certify the court's prior decisions, specifically those rendered in October 2004 (*Wolfchild I*), December 2005 (*Wolfchild II*), and August 2006 (*Wolfchild III*), for interlocutory appeal under 28 U.S.C. § 1292(d)(2), and to stay discovery and other preparatory proceedings in the interim. All of the plaintiffs and intervening plaintiffs oppose this motion on procedural (*i.e.*, untimeliness) and substantive grounds. By this decision, the court addresses each of the parties' pending motions and requests.

ANALYSIS

A. Pre-Trial Plan and Schedule

Looking forward to efforts by the parties to prepare this case for resolution on the merits, in *Wolfchild IV* the court asked counsel to undertake three steps: (1) that counsel for the various groups of intervening plaintiffs select a proposed coordinating counsel and an alternate for each of the two different categories of individual intervening plaintiffs, namely, those who claim descendancy from persons on the 1886 and 1889 censuses prepared by special agents of the Department of the Interior and those whose claim has another source, (2) that counsel for the parties confer and submit a plan and schedule for

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"who's a lineal descendant." Hr'g Tr. 76:25 to 77:3 (Aug. 6, 2007).

pre-trial proceedings, and (3) that counsel for plaintiffs and for each group of intervening plaintiffs submit compact disks listing the individual claimants represented by them, including, separately to the court and counsel for defendant only, lists of those claimants who have been granted leave to participate anonymously in this litigation. 77 Fed.Cl. at 36. Those steps have been accomplished.

The court acknowledges and accepts the selection by counsel for intervening plaintiffs of Sam Killinger as coordinating counsel for Group A, the intervening plaintiffs who claim descendancy from the 1886 and 1889 censuses, with Garrett Horn as the alternate and Kelly Stricherz as assistant for Group A, and Gary Montana as coordinating counsel for Group B, those intervening plaintiffs who base their claim on other sources, with Creighton Thurman as the alternate and Robin Zephier as assistant. These counsel have accepted responsibility for drawing together the positions of the groups of intervening plaintiffs on the issues that may arise and for presenting the positions of their groups to the court in a single filing, if feasible. Hr'g Tr. 29:7 to 31:8, 34:11-24 (Aug. 6, 2007).[8]

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[8] Most of the lineal descendants who have appeared and submitted a claim as plaintiff or intervening plaintiff live in Minnesota, Nebraska, South Dakota, Iowa, and Montana, Hr'g Tr. 45:22-23, and counsel generally are located in the upper Midwest and Plains States.

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The plan and schedule proposed by plaintiffs and intervening plaintiffs has six basic elements: (1) initial disclosures under Rule 26(a) of the Rules of the Court of Federal Claims ("RCFC"), (2) discovery particularly to identify trust assets and the handling of those assets, to include U.S. Treasury accounts 147436 and 147936 for the Bureau of Indian Affairs, as well as the 1886 lands, (3) discovery regarding revenues or income produced or generated by or from the 1886 lands by the Communities, and from monies transferred to the Communities by the Department of the Interior, and payments and distributions made by the Communities of such revenues or income, (4) a bar on the deposition of any individual plaintiff or intervening plaintiff, absent court approval, (5) a schedule for submission and briefing of summary judgment motions, and (6) a time for commencement of trial. Joint Status Report (July 20, 2007) ("JSR") at 3-4, 31-47, 48-64 and following sheet. Defendant "objects to proceeding with initial disclosures at this stage," or taking any of the other further preparatory elements identified by plaintiffs and intervening plaintiffs, pending final action on its motion for certification for interlocutory appeal. JSR at 28.

The government concedes that fundamental issues remain unresolved and, indeed, significantly unexplored. Among other things, "[d]efendant notes

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All citations to the "Hr'g Tr." in this decision are to the transcript of the hearing held on August 6, 2007.

particularly that the question of the scope of the alleged trust, including what types of assets lie within that 'trust,' has yet to be determined in this litigation." JSR at 29. Notably, the court's initial obligations in these cases were to determine whether plaintiffs had stated a viable claim over which the court had jurisdiction, *see Steel Co. v. Citizens for a Better Env't,* 523 U.S. 83, 88-89, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998), and then to oversee joinder of additional parties in an orderly manner in this collective action. *See Hoffmann-La Roche, Inc. v. Sperling,* 493 U.S. 165, 170-71, 110 S.Ct. 482, 107 L.Ed.2d 480 (1989). The court has fulfilled those responsibilities, and in the process has granted partial summary judgment to plaintiffs and added thousands of plaintiffs and intervening plaintiffs to the litigation. Now, when the time for fleshing out the fundamental issues is at hand, it would be notably unfair and prejudicial to the plaintiffs to halt preparatory steps to that end. Accordingly, acting pursuant to RCFC 16(b) and RCFC Appendix A, ¶¶ 7-8, the court adopts a modified schedule for further proceedings, as set out at the conclusion of this opinion.

B. Residual Party-Related Issues

Although *Wolfchild III* and *Wolfchild IV* addressed questions about participation of numerous individuals and the Communities in this litigation, the parties have raised residual party-related issues. Managing this collective action with a very large

number of individual claimants separated into so many groups has proved to be a daunting task. *See Wolfchild IV,* 77 Fed.Cl. at 34 ("This action threatens to become so cumbersome and laden with claimants that bringing it to a final conclusion within a reasonable time is put in jeopardy."). In April 2007, after first imposing a twice-extended deadline for claimants to intervene as plaintiffs, and then allowing yet a further set of motions to intervene and to amend previously granted interventions, the court warned that "any future requests by individuals to participate in the *Wolfchild* case as claimants will be deemed to be untimely and to impair the manageability of this suit." *Id.* at 35-36.[9] Noting that the statute of limitations had not yet begun to run because of the Indian Trust Accounting Statute, the court advised that "[f]urther individuals who wish to pursue claims of breach of trust arising out of the 1888, 1889, and 1890 Appropriations Acts must file separate actions to vindicate their positions." *Id.* at 36. Now, at this later stage of the case the court has been presented with numerous requests to correct names, including those of newly married persons as well as others, and to add children newborn to persons already named as plaintiffs or intervening plaintiffs. Twenty-one such motions are pending, filed by plaintiffs and by twenty groups of intervening

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[9] The court acted in accord with its authority in a collective action to "limit [ ] time for . . . the joinder of additional parties." *Hoffmann-La Roche,* 493 U.S. at 173, 110 S.Ct. 482.

plaintiffs. At a hearing held on August 6, 2007, the court required that any such motion be filed on or before August 20, 2007. Each of the pending motions was filed by that date.

The government has not objected to these motions insofar as they seek to correct names or to add newborn children, *see* Def.'s Resp. to Garreau (Hall) Mot. for Leave to File Am. Compl. to Correct Names [582] at 1; Def.'s Omnibus Mem. of Points and Authorities [596] ("Def.'s Omnibus Mem.") at 2-3, but it has objected to adding other additional plaintiffs. Def.'s Omnibus Mem. at 4-5. For purposes of amending the complaint and intervening complaints in this litigation, the government would define "newborns" as those persons born between July 12, 2006 and August 20, 2007. *Id.* at 2. The government recites that the common definition of "newborn" is a "neonate" or a "newborn infant, especially less than four weeks old." *Id.* at 3 (quoting *The American Heritage Dictionary of the English Language* 1178 (4th ed.2000)).[10] Here, however, the government puts forward a more expansive definition of newborn to account for the fact that the court previously set July

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[10] The definition actually quoted by defendant is that for "neonate," not "newborn." *Compare The American Heritage Dictionary of the English Language* 1178 ("[N]eonate" means "[a] newborn infant, especially one less than four weeks old."), *with id.* at 1184 ("[N]ewborn" means "[v]ery recently born.") "Neonate" thus implies that a baby has been born within a more specifically defined recent time than "newborn." For purposes of this case, the difference is not significant.

12, 2006, as the extended deadline for intervention. *Id.* at 2.

The court conceptually accepts the government's suggested expansive definition of newborn for purposes of the pending motions. However, the government's proposed delineating dates for the newborns have to be modified. It would be unrealistic to expect that child born shortly before the prior deadline for intervention could reasonably have been included in a complaint for intervention. Accordingly, the court will consider newborns for this specific purpose to be persons born between January 1, 2006 and August 20, 2007.

Four groups proposed to include newborn children who are *en ventre sa mere*. *See* the motions to amend filed by the Whipple group [538], Lafferty group [539], Lowe group [540], and Mozak group [547]. The government acknowledges that the court previously allowed unborn children to be included in a complaint in intervention, at least conditionally. Def.'s Omnibus Mem. at 3-4 (referring to *Wolfchild IV*, 77 Fed.Cl. at 35 n. 22). The court's prior action was based upon the common law rule that a child *en ventre sa mere* is deemed to be *in esse* for purposes of inheritance or taking a remainder or other estate of interest for its own benefit. *Wolfchild IV*, 77 Fed.Cl. at 35 n. 22. The government does not challenge the common law rule, but it does resist the conclusion that an unborn child possesses a cause of action cognizable in federal court for damages. Def.'s Omnibus Mem. at 4. Nonetheless, the government

does not oppose the addition of those putative plaintiffs in this litigation, so long as they are properly identified. *Id.* The court consequently allows unborn children to be added to the listing of individual plaintiffs for the four groups of intervenors which sought to include them.

Plaintiffs and four groups have sought to amend their complaints to add persons who were not newborns.[11] The groups do not offer an explanation or justification for these additions, other than the representation that the new claimants were "inadvertently not included" earlier, Aff. Re Am. Compl. [562], and that no prejudice to any party would result from the addition. Intervenors' Reply [617] at 2. *See also* Pl.'s and Intervenors Supplement to Joint Status Report and Response. . . . Addressing the United States' Opposition to Amend Complaints [623] at 5 (contending that no prejudice would arise from adding claimants at this stage of the case, and requesting that the court "permit an additional filing period of three additional weeks for amended complaints adding additional [p]laintiffs and [i]ntervenors."). Also, in the same vein, one new group, the Werner

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[11] Plaintiffs [567], and the Vadnais [558], Julia DuMarce [545], Rocque [524], and Marvel DuMarce [560] groups of intervening plaintiffs have sought to add a person or persons not previously named in any prior complaint or complaint in intervention.

group, has sought leave to intervene.[12] In support of the Werner group's motion, the applicants for intervention aver that they are descendants of persons listed on the 1886 census of loyal Mdewakanton prepared by Special Agent Walter McLeod for the Department of the Interior. Applicant's Mem. [550] at 1. They explain that the timing of their application was governed by their need to produce "genealogical information to establish their connection as rightful lineal descendants." *Id.* at 2. The government opposes these additions, noting that the court in *Wolfchild IV* had specified that further requests by individuals to participate as claimants would be deemed to be untimely. Def.'s Omnibus Mem. at 4-5 (drawing upon *Wolfchild IV,* 77 Fed.Cl. at 35-36); Def.'s Resp. In Opposition to Werner Group's Mem. [601] at 2.

The court concurs with the government's opposition to these efforts to add plaintiffs other than newborns, notwithstanding the fact that under RCFC 15(a) amendments are generally favored. As the rule specifies, "leave [to amend a pleading] shall be freely given when justice so requires." RCFC 15(a); *see also Foman v. Davis.* 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962). However, a motion to amend may be denied because of, among other things, undue delay or prejudice to existing parties. *Foman,* 371 U.S. at 182, 83 S.Ct. 227; *Te-Moak Bands of W.*

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[12] The Werner group's motion to intervene [550] would add a further set of intervening plaintiffs comprised of fourteen adults and seven minor children.

Shoshone Indians of Nev. v. United States, 948 F.2d 1258, 1260 (Fed.Cir.1991); *Christofferson v. United States*, 77 Fed.Cl. 361, 363-66 (2007); *Rockwell Automation, Inc. v. United States*, 70 Fed.Cl. 114, 121-23 (2006).[13] Here, the proposed additions come too late. As the court has observed, this action has already become extraordinarily "cumbersome and laden with claimants." *Wolfchild IV*, 77 Fed.Cl. at 34. A belated addition of other claimants would exacerbate the problems in managing the litigation and imperil the "just, speedy, and inexpensive determination" of the pending claims and defenses. RCFC 1. Particularly because the applicants who are not being allowed to join their claims in this litigation may file separate actions for relief without facing any bar from a statute of limitations, *see Wolfchild IV*, 77 Fed.Cl. at 36, the proposed addition of new intervening plaintiffs other than newborns will not be allowed.

Separately, the intervention of members of the Felix family poses a discrete pair of questions. First, those persons who are members of the extended but not immediate family of Francis Elaine Felix have moved for leave to be added to the Rocque group of intervening plaintiffs [524]. The extended Felix family had previously sought intervention in June 2006, and the court "allowed Ms. Felix to represent her family" only for purposes of the intervention

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[13] A motion for intervention under RCFC 24 must also be predicated upon a "timely application." RCFC 24(a), (b).

motion. *Wolfchild II,* 72 Fed.Cl. at 519 n. 9. The intervention motion was granted. *Id.* at 539. However, at that time the court noted that under RCFC 83.1(c)(8), Ms. Felix could represent herself and her "immediate" family on a *pro se* basis but could not represent the members of her extended family. *Id.* at 519 n. 9. As a result, the court required the members of her extended family to appear by counsel. *Id.* They did not do so in a timely fashion.

When the extended Felix family finally did act to protect their claims, they sought to "clarify" that they were and remained intervening plaintiffs even though they were not represented by counsel and had not filed a separate complaint in intervention. *See* Mot. to Clarify [506]. The government resisted that motion but advised that it would not oppose the addition of specifically identified members of the extended Felix family to an existing group of intervening plaintiffs, so long as no new answers were required. *See* Def.'s Resp. to Mot. to Clarify [513] at 2-3. Those conditions have been satisfied. Accordingly, the court grants the motion to amend the complaint in intervention of the Rocque group, to add individually identified members of the extended Felix family.

Second, the government objects to inclusion of Ms. Felix's grandchildren in her "immediate" family group, represented by her on a *pro se* basis. *See* Def.'s Resp. to Mot. to Clarify [513] at 3 n. 2; Hr'g Tr. 14:3-25. The government has done so on the basis that the term "immediate family" as used in RCFC 83.1(c)(8),

allowing representation on a *pro se* basis, encompasses a nuclear family of parents and children but not grandchildren. The government points to a prior decision to that effect by a judge of this court, *Chief War Eagle Family Ass'n v. United States*, No. 07-213L (Fed.Cl. July 18, 2007) (refusing to allow a *pro se* litigant to represent his grandparents). In interpreting the rule, the court in *Chief War Eagle* relied upon a definition of "immediate family" set out in *Black's Law Dictionary*, providing that a family so limited consisted of "[a] person's parents, spouse, children and siblings." *See Chief War Eagle*, slip op. at 2 (citing *Black's Law Dictionary* 638 (8th ed.2004)). However, this court modestly and respectfully disagrees with, and will not follow, the interpretation accorded RCFC 83.1(c)(8) in *Chief War Eagle*. The cited definition itself refers to three generations of persons, not two. Moreover, with longevity increasing, societally there are more and more instances where, because of employment of both spouses or single parents, grandparents are directly involved in the care of children, or instances where parents are caring simultaneously for their children and their parents. Thus, a three-generational span of direct familial interaction is again becoming typical. Accordingly, limiting "immediate" to two generations is unduly constraining. Ms. Felix may represent herself, her children, and her grandchildren.[14] The

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[14] Although Ms. Felix is appearing *pro se*, this litigation is proceeding as an "electronic case." Arrangements have been

(Continued on following page)

government has acquiesced in this result. Hr'g Tr. 14:13-18.

C. Certification For Interlocutory Appeal

The government has moved for certification for interlocutory appeal of three questions:

> (1) Whether a trust was created in connection with and as a consequence of the 1888, 1889, and 1890 Appropriations Acts for the benefit of the loyal Mdewakanton and their lineal descendants, which trust included land, improvements to land, and monies as the corpus;
>
> (2) If the Appropriations Acts created such a trust, whether Congress terminated the trust with enactment of the 1980 Act; and
>
> (3) Whether the Lower Sioux, Prairie Island and Shakopee Indian Communities act as the agents of the United States as a result of the 1980 Act.

Def.'s Mot. to Certify Orders for Interlocutory Appeal ("Def.'s Mot. to Certify") [510] at 4-5. As the government would have it, the requirements of 28 U.S.C. § 1292(d)(2) for certification are satisfied as to these three questions. *Id.* at 4-20.

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made for her to send and receive electronic filings through her brother, who is an attorney.

Paragraph 1292(d)(2) of Title 28 provides in pertinent part that:

> [w]hen any judge of the United States Court of Federal Claims, in issuing an interlocutory order, includes in the order a statement that a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that an immediate appeal from that order may materially advance the ultimate termination of the litigation, the United States Court of Appeals for the Federal Circuit may, in its discretion, permit an appeal to be taken from such order, if application is made to that Court within ten days after the entry of such order.

In slightly restated form, for a certification to be adopted, this statutory provision requires the court to determine that (1) a controlling question of law is at issue, (2) a substantial ground for differences of opinion exists regarding that question, and (3) certification may advance the ultimate termination of the litigation. The statute thus "establishes a three-part test for certification that 'is virtually identical to the statutory standard of certification utilized by the United States district courts [under 28 U.S.C. § 1292(b)].'" *Marriott Intern. Resorts, L.P. v. United States*, 63 Fed.Cl. 144, 145 (2004) (quoting *American Mgmt. Sys., Inc. v. United States*, 57 Fed.Cl. 275, 276 (2003) (some internal quotation marks omitted)). Conceptually, these statutory provisions "reserve interlocutory review for 'exceptional' cases while

generally retaining for the federal courts a firm final judgment rule." *Caterpillar Inc. v. Lewis,* 519 U.S. 61, 74, 117 S.Ct. 467, 136 L.Ed.2d 437 (1996) (quoting *Coopers & Lybrand v. Livesay,* 437 U.S. 463, 475, 98 S.Ct. 2454, 57 L.Ed.2d 351 (1978), in turn quoting *Fisons, Ltd. v. United States,* 458 F.2d 1241, 1248 (7th Cir.1972)).

Prior to applying the three-part statutory test, however, in this instance a threshold requirement for certification must be addressed. Any such request for certification must be timely. The governing statute sets no particular time limit on seeking certification of an interlocutory appeal. Nonetheless, the statute refers to an "immediate appeal," 28 U.S.C. § 1292(d)(2), and as Judge Posner explained in an opinion for the Court of Appeals for the Seventh Circuit in *Weir v. Propst,* 915 F.2d 283, 286 (7th Cir.1990), a timely motion for certification is required. Pointing to the circumstance that under Section 1292 a petition to the court of appeals has to be filed within ten days from the trial court's certification, Judge Posner commented that

> celerity was to be the touchstone of appealability under th[e] section. The reason is not hard to see. An interlocutory appeal normally interrupts the trial even though it does not suspend the trial court's jurisdiction, and the parties ought to know at the earliest possible opportunity whether such an interruption is going to occur.

Id.

As a general matter, this court has denied motions to certify where the motion was made more than several months after the decision sought to be certified for interlocutory appeal was entered. *See Scholl v. United States,* 68 Fed.Cl. 58, 60 (2005) (collecting precedents). Under the prior decisions applying Section 1292(d)(2), certification by amending a prior order was allowed up to three months after the order was issued when good cause was shown for the delay. *Id.* (citing *Marriott Int'l,* 63 Fed.Cl. at 145). When the delays were longer, certification was denied. *Id.* These precedents are in agreement with the more broadly cast commentary in *Weir* that

> [t]he ten-day limitation in section 1292(b) is not to be nullified by promiscuous grants of motions to amend [prior interlocutory rulings]. An amendment that will have the effect of extending the limitation is proper only if there is a reason for the delay, as there would be for example if developments since the interlocutory order had been entered demonstrated, as had been unclear earlier, that the order resolved a controlling question of law about which there was substantial ground for a difference of opinion.

915 F.2d at 287.

In this instance, the government does not offer good cause for its delay of more than two and one-half years in moving for amendment of *Wolfchild I* to

certify an appeal, and delays of nineteen and eleven months in moving to amend and certify *Wolfchild II* and *Wolfchild III*.In justification, the government indicates only that the court has largely completed "its rulings on . . . party-related motions," Def.'s Mot. to Certify at 2, and that "[t]his litigation is at a point where interlocutory appeal is appropriate." *Id.* The party-related motions, however, have had only a tangential bearing on the two key questions the government asks the court to certify, *i.e.*, whether the Appropriation Acts and the Department of the Interior's subsequent implementation of those Acts created a trust and whether the 1980 Act terminated that trust. In short, the government's motion to amend the interlocutory orders issued in October 2004 (*Wolfchild I*), December 2005 (*Wolfchild II*), and August 2006 (*Wolfchild III*) to certify those orders for interlocutory appeal is untimely and must be denied.

In supplemental briefing, the government changes its approach and argues that the court could rectify the timeliness problems that arise with its motion to amend the earlier orders by entering a fresh order adopting the earlier orders and, in effect, certifying the new order for interlocutory appeal. Def.'s Supp. Br. in Support of Its Mot. to Certify at 2. Conceptually, this approach has some merit. *Weir*, for example, recognized that a subsequently issued order might provide an occasion to seek an appeal. *See* 915 F.2d at 286 ("If the deadline is missed, the order is not appealable. The defendant must then wait until

another appealable order (normally, the final judgment) is entered, upon appeal of which he can challenge any interlocutory order that has not become moot."). *Compare Jenkins v. BellSouth Corp.*, 491 F.3d 1288, 1291-92 (11th Cir.2007) (rejecting under Fed.R.Civ.P. 23(f) a district court's effort to revive a class-certification decision for interlocutory appeal where the party seeking such appeal had failed to petition the court of appeals within ten days of the initial decision by the district court), *with Aparicio v. Swan Lake*, 643 F.2d 1109, 1112 (5th Cir.1981) (recognizing a district court's authority to vacate and reenter a certification order for purposes of 28 U.S.C. § 1292(b) where "the previous justification for a certification continues to exist"). Accordingly, the court will consider whether certification of *this* order might satisfy the criteria specified in Section 1292(d)(2).

The government argues that each of the three questions it seeks to raise on interlocutory appeal involves controlling questions of law. That proposition is arguably correct as to the first question posed, *i.e.*, whether the Appropriation Acts and the Department of Interior's implementation of them created a trust, is more confidently correct as to the second question, *i.e.*, whether the 1980 Act terminated the trust, and is assuredly *not* correct as to the third question respecting agency.

Taking the last question first, agency is ordinarily a mixed question of law and fact, *see Restatement (Third) Agency* § 1.02 cmt. a (2006)

("Whether a relationship is one of agency is a legal conclusion made after an assessment of the facts of the relationship and the application of the law of agency to those facts."); William A. Gregory, *The Law of Agency and Partnership* § 30.3, at 30 (2d ed. 2001) ("[A]gency and authority may be proved by any relevant facts."), and the court has had no occasion to make any findings of fact respecting whether an agency relationship exists or existed between the Department of the Interior and the Communities. Indeed, as the court has previously pointed out, the circumstances under which the 1886 lands and monies were transferred to the Communities has not been addressed in any detail. *See Wolfchild I,* 62 Fed.Cl. at 533 (discussing Letter from David Granum, Acting Area Director of the Bureau of Indian Affairs to Leon Columbus, Chairman, Community Council, Lower Sioux Community (Jan. 15, 1981), and Letter from Elmer T. Nitzschke, Field Solicitor, to Edwin Demery, Area Director (Feb. 6, 1981)). In issuing a summary judgment in *Wolfchild I* that a trust was formed and that the government had breached that trust, the court was satisfied beyond dispute *only* that real property and cash had been transferred from the Department to the Communities. *Wolfchild I,* 62 Fed.Cl. at 533. The agency question suggested by the government consequently cannot be certified for interlocutory appeal because it neither has been decided by this court nor is a question of law, let alone a controlling question.

The second question relating to the effect of the 1980 Act on the trust is a relatively straightforward question of law. The terms of the 1980 Act provide a basis for deciding that question. As the court observed in *Wolfchild I,* the 1980 Act contains no language of termination, and, indeed, it explicitly preserves aspects of the preexisting trust arrangement established by the Department. 62 Fed.Cl. at 543. The second question accordingly could be certified, if the other criteria in Section 1292(d)(2) were to be met. *See AD Global Fund, LLC v. United States,* 68 Fed.Cl. 663, 664-65 (2005).

The first question respecting trust creation is complicated by the fact that the terms of the 1888, 1889, and 1890 Appropriation Acts are crucial, along with the terms of, and experience under, the earlier 1863 Act, but the implementation of those Acts by the Department of the Interior also has a strong role. *See Wolfchild I,* 62 Fed.Cl. at 541-42. In connection with the decisions rendered in *Wolfchild I* and *Wolfchild II,* the parties collected and submitted for the court's consideration a large volume of documents related to implementation. In the circumstances, the question of whether a trust exists is a question of law with attendant factual underpinnings. *See Restatement (Third) Trusts,* § 2 cmt. f, at 21 (2003) ("In the strict, traditional sense, a trust involves three elements: (1) a trustee, who holds the trust property and is subject to duties to deal with it for the benefit of one or more others; (2) one or more beneficiaries, to whom and for whose benefit the trustee owes the duties with

respect to the trust property; and (3) trust property, which is held by the trustee for the beneficiaries."). Trusts created by statute may be governed by terms established in the statute or by general trust law. *See Restatement (Third) Trusts*, § 4, cmt. g, at 41 ("Some forms of trusts that are created by statute, especially public retirement systems or pension funds, and sometimes public land trusts, school land trusts, or trusts for benefit of native populations, are administered as express trusts, the terms of which are either set forth in the statute or are supplied by the default rules of general trust law."). The court was satisfied with the statutory and agency-implementing underpinnings and granted summary judgment in plaintiffs' favor on the issue. *Wolfchild I*, 62 Fed.Cl. at 540-42.[15] Accordingly, that question could be certified for interlocutory appeal.

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[15] The Appropriation Acts stated the grants for the benefit of the loyal Mdewankanton in terms that satisfied the common law elements for formation of a trust, *see supra*, at 475 n. 3, but did not explicitly use the word "trust." *See Wolfchild I*, 62 Fed.Cl. at 540-41 (quoting *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 474 n. 3, 123 S.Ct. 1126, 155 L.Ed.2d 40 (2003)). The Department of the Interior used the word "trust" in its implementing documents issued thereafter. *Id.* at 529-30, 541-42 (quoting among other documents, the Indian Land Certificates issued to loyal Mdewakanton, the earliest of which in this record was dated June 1, 1905, as well as a Memorandum from the Acting Associate Solicitor for Indian Affairs to the Commissioner of Indian Affairs (Mar. 19, 1974), and a letter from the Field Solicitor to the Minneapolis Area Director of the Bureau of Indian Affairs (Nov. 8, 1978)).

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Both the first and second questions are "controlling" in the sense that the existence of a trust and the absence of a statutory termination of that trust "'materially affect' issues remaining to be decided in the trial court." *Marriott Int'l*, 63 Fed.Cl. at 145 (quoting *Pikes Peak Family Housing, LLC v. United States*, 40 Fed.Cl. 673, 686 (1998)); *see also Jade Trading, LLC v. United States*, 65 Fed.Cl. 443,

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Arguably, the Appropriation Acts themselves allowed, but did not require, that a trust be created. A mechanism different from a trust for aiding the loyal Mdewakanton might have satisfied the terms of the Appropriation Acts. However, the terms of the Appropriation Acts fit comfortably within a trust regime, and the Department of the Interior chose that mechanism for its implementation. As the Federal Circuit recently stated, "[w]here the government exercises actual control within its authority, neither Congress nor the agency needs to codify such actual control for a fiduciary trust relationship that is enforceable by money damages to arise." *Navajo Nation v. United States*, 501 F.3d 1327, ___, 2007 WL 2685641, at *14 (Fed.Cir.2007) (citing *White Mountain Apache*, 537 U.S. at 475, 123 S.Ct. 1126) (finding "a fair inference that an obligation to preserve the property improvements was incumbent on the United States as trustee" where the government exercised its discretionary authority to supervise and occupy property); *United States v. Mitchell*, 463 U.S. 206, 225, 103 S.Ct. 2961, 77 L.Ed.2d 580 (1983) ("[W]here the Federal Government takes on or has control or supervision over tribal monies or properties, the fiduciary relationship normally exists with respect to such monies or properties (unless Congress has provided otherwise).").

447 (2005) (controlling question of law not presented by nonparty discovery issue).

The second criterion, whether "there is a substantial ground for difference of opinion," is arguable. This is a case of first impression. Strong indicia of the existence of a trust are present. The Appropriation Acts themselves reflect the common law elements of a trust. *Wolfchild I*, 62 Fed.Cl. at 540-41. From the early days of implementation forward, the Department of the Interior used the term "trust" in the Indian Land Certificates employed to convey possessory rights in parcels of the 1886 lands to lineal descendants. *See id.* at 529 (quoting Indian Land Certificate of Harry Bluestone (June 1, 1905)). And, subsequent statutes accorded the disposition of small parcels of the 1886 lands as deserving of treatment typically accompanying the partial termination of a trust. *See id.* at 529, 541 (discussing the Act of Feb. 25, 1901, 31 Stat. 805, 806, ("1901 Act"), provisions of which required the consent of beneficiaries for the disposition); *Wolfchild II*, 68 Fed.Cl. at 787-88 (addressing the 1901 Act along with principles set out in *Restatement (Third) of Trusts* § 65 (2003) (requirements for termination of a trust)), 789-90 (analyzing the Act of June 13, 1944, Pub.L. No. 78-335, 58 Stat. 274, which also provided for disposition of a parcel of the 1886 lands). Nonetheless, the conclusion that a trust was created involved the analysis and assessment of a number of statutes and many implementing steps taken over a span of 90 years. In these circumstances, the court

accords some weight to the government's desire to present its arguments to the court of appeals at this juncture and concludes that the second criterion has been sufficiently satisfied.

The third consideration is discretionary, turning on whether certification "*may* materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(d)(2) (emphasis added). Here, there is no doubt that the question of the existence, and continued existence, of a trust is at the heart of this litigation and that a ruling by the court of appeals on the trust issues would advance the resolution of the disputed matters.

As a result, the court concludes that certification for interlocutory appeal of the first two questions posed by the government is appropriate, as part of *this order, not* the prior orders issued in October 2004, December 2005, and August 2006. Good cause has not been shown to amend the prior orders, and they will remain undisturbed. As this opinion plainly indicates, the court continues to adhere to its prior rulings and to apply them in continuing proceedings in this litigation. The two questions thus certified relate to creation of a trust in connection with and as a consequence of the implementation of the Appropriation Acts by the Department of the Interior, and the continued existence of that trust after the 1980 Act. The question of agency proposed by the government is not certified.

Because the government's motion to certify orders is in many respects untimely, and because the parties have expended substantial resources in developing and addressing the party-related issues as a preamble to reaching this point, the court will not stay proceedings while the government petitions the court of appeals to grant interlocutory appeal of the two certified questions.

As Judge Posner pointed out in *Weir,* this court's jurisdiction is not displaced by a petition to grant an interlocutory appeal. *See* 915 F.2d at 286 ("An interlocutory appeal normally interrupts the trial even though it does not suspend the trial court's jurisdiction."). Discovery and other preparatory steps will accordingly proceed under the schedule being adopted by and with this opinion and order. However, if the court of appeals should grant an interlocutory appeal, then the proceedings in this court shall be stayed beginning with the date of such grant. *See*28 U.S.C. § 1292(d)(3) ("Neither the application for nor the granting of an appeal under this subsection shall stay proceedings in the Court of International Trade or in the Court of Federal Claims, as the case may be, unless a stay is ordered by a judge of the Court of International Trade or of the Court of Federal Claims or by the United States Court of Appeals for the Federal Circuit or a judge of that court.").

CONCLUSION

In accord with RCFC 16(b) and RCFC Appendix A, ¶¶ 7-8, discovery and further pretrial steps shall proceed in accord with the following schedule:

Schedule

Event	*Deadline*
initial disclosures	November 1, 2007
initial interrogatories and document disclosure requests	November 20, 2007
disclosure of names of expert witnesses	December 28, 2007
production of expert reports	February 1, 2008
production of rebuttal expert reports	March 11, 2008
conclusion of fact discovery[16]	March 28, 2008
conclusion of expert discovery	April 30, 2008
submission of any motions for summary judgment (except for cross-motions)	May 30, 2008

The motions to amend pleadings filed by the Garreau (Hall) group [523], Anonymous Blair

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[16] Contrary to plaintiffs's request, there shall be no bar on depositions of individual plaintiffs or intervening plaintiffs absent court order. Instead, discovery including depositions shall proceed in accord with RCFC 26-37. If any discovery requests prove to be oppressive or unduly burdensome, the court will entertain a motion for a protective order under RCFC 26(b).

(Renaud) group [528, 529], Burley group [532], Anonymous Walker group [521-22, 534-537], Whipple group [538], Lafferty group [539], Lowe group [540], Kitto group [541], Enyard group [542], Zephier group [543],[17] Mozak group [547], Ferris group [551], Henry group [553], Trudell group [554], and Vassar group [555] are GRANTED. The motions to amend filed by plaintiffs [567] and by the Rocque group [524], Julia DuMarce group [545], Vadnais group [558], and Marvel DuMarce group [560] are GRANTED IN PART and DENIED IN PART.[18] They are granted insofar as they seek to add as plaintiffs and intervening plaintiffs newborns and persons already granted intervention as prior members of the extended Felix group.[19] In other respects, those motions are denied, and defendant's corresponding motions to strike in part [606, 587] plaintiffs's Fifth Amended Complaint [567] and the amended complaint proffered by the Rocque group [524] are

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[17] For good cause shown, the grant of the Zephier group's motion includes the addition as an intervening plaintiff of one person who is not a newborn. *See* Hr'g Tr. 27:23 to 28:10.

[18] Nancy Smith should be included within the Rocque group because she was listed in that group's initial complaint in intervention but was mistakenly deleted from the subsequently amended complaints. *See* Response of Rocque Group to Def.'s Mt. to Strike [620] at 4.

[19] In addition, plaintiffs and the Henry and Trudell groups of intervening plaintiffs shall provide for each minor plaintiff or intervening plaintiff a listing in electronic format of the minor's name, the adult plaintiff appearing as parent or guardian of the minor, and the particular capacity in which the adult is acting, *e.g.*, parent, guardian, etc.

GRANTED IN PART. The motion for leave to intervene by the Werner [St. Clair] group [548] is DENIED, without prejudice to the filing by that group of an original complaint in a separate action. The motion to clarify filed by the extended Felix group [506] is DENIED as moot.

Defendant's motion to certify orders for interlocutory appeal [510] is GRANTED IN PART and DENIED IN PART. That motion is granted insofar as the court certifies for interlocutory appeal the following two questions in connection with *this* order:

(1) Whether a trust was created in connection with and as a consequence of the 1888, 1889, and 1890 Appropriations Acts for the benefit of the loyal Mdewakanton and their lineal descendants, which trust included land, improvements to land, and monies as the corpus; and

(2) If the Appropriations Acts created such a trust, whether Congress terminated that trust with enactment of the 1980 Act.

The motion in all other respects is denied. This court's proceedings shall *not* be stayed pending the government's filing of a petition with the court of appeals for interlocutory appeal, except that a stay shall automatically come into force if and when the court of appeals should grant interlocutory appeal.

IT IS SO ORDERED.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

2008-5018

SHELDON PETERS WOLFCHILD, et al., ERNIE PETERS LONGWALKER, et al., SCOTT ADOLPHSON, et al., MORRIS J. PENDLETON, et al., BARBARA FEEZOR BUTTES, et al., WINIFRED ST. PIERRE FEEZOR, et al., AUTUMN WEAVER, et al., ARIES BLUESTONE WEAVER, et al., ELIJAH BLUESTONE WEAVER, et al., RUBY MINKEL, et al., LAVONNE A. SWENSON, et al., WILLIS SWENSON, et al., AARON SWENSON, et al., BEVERLY M. SCOTT, et al., LILLIAN WILSON, et al., MONIQUE WILSON, et al., SANDRA COLUMBUS GESHICK, et al., CHERYL K. LORUSSO, et al., JENNIFER K. LORUSSO, et al., CASSANDRA SHEVCHUK, et al., JASON SHEVCHUK, et al., JAMES PAUL WILSON, et al., EVA GRACE WILSON, et al., BENITA M. JOHNSON, et al., and KEVIN LORUSSO, et al.,

Plaintiffs-Appellees,

and

HARLEY D. ZEPHIER, SR., et al.,

Plaintiffs-Appellees,

and

ELIZABETH T. WALKER, WALKER GROUP, and JOHN DOES 1-30,

Plaintiffs-Appellees,

and

GERTRUDE GODOY, et al., MICHAEL STEPHENS, et al., JESSE CERMAK, et al., DELORES KLINGBERG, et al., SALLY ELLA ALKIRE, et al., PIERRE GEORGE ARNOLD, JR., et al., and DENISE HENDERSON, et al.,

Plaintiffs-Appellees,

and

LOWER SIOUX INDIAN COMMUNITY,

Plaintiff-Appellee,

and

WINONA C. THOMAS ENYARD, et al., and JEFFREY ARNOLD KITTO, et al.,

Plaintiffs-Appellees,

and

MADALINE ROCQUE, et al., MARY TAYLOR (TATEWASTEWIN), et al., MARGARET (DUMARCE) PRESCOTT, et al., and JOSEPH COURSOLLE, et al.,

Plaintiffs-Appellees,

and

MARY BETH LAFFERTY, et al., ANITA D. WHIPPLE, et al., BONNIE RAE LOWE, et al., and LENOR A. SCHEFFLER BLAESER, et al.,

Plaintiffs-Appellees,

and

JULIA DUMARCE, et al.,

Plaintiffs-Appellees,

and

FRANCINE GARREAU HALL, et al.,

Plaintiffs-Appellees,

and

KRISTINE ABRAHAMSON, et al.,

Plaintiffs-Appellees,

and

VICTORIA ROBERTSON VADNAIS, et al.,

Plaintiffs-Appellees,

and

MARVEL JEAN DUMARCE, et al.,
and VIVIAN CORDELIA YOUNGBEAR, et al.,

Plaintiffs-Appellees,

And

DANNY LEE MOZAK,

Plaintiffs-Appellees,

DAWN BURLEY, RAYMOND COURNOYER, SR., FRANCIS ELAINE FELIX, REBECCA ELIZABETH FELIX, LYDIA FERRIS, LESLIE LEE FRENCH, DAWN HENRY, SANDRA KIMBELL, JERRY ROBINETTE, VERA A. ROONEY, DEBORAH L. SAUL, ROBERT LEE TAYLOR, DANIEL M. TRUDELL, LAURA VASSAR, CHARLENE WANNA, KE ZEPHIER, and JOHN DOES 31-433,

Plaintiffs,

v.

UNITED STATES,

Defendant-Appellant.

Appeal from the United States Court of Federal Claims in case 03-CV-2684, Judge Charles F. Lettow.

ORDER

(Filed Jun. 11, 2009)

A petition for rehearing en banc having been filed by the Appellees*, and the matter having first been referred as a petition for rehearing to the panel that heard the appeal, and thereafter the petition for rehearing en banc having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate of the court will issue on June 18, 2009.

FOR THE COURT,

/s/ Jan Horbaly /JB
Jan Horbaly
Clerk

Dated: 06/11/2009

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* Sheldon Peters Wolfchild, et al.

cc: Aaron P. Avila
All Appellees Counsel
Steven D. Gordon

WOLFCHILD V US, 2008-5018
(CFC – 03-CV-2684)

*Sheldon Peters Wolfchild, et al.

POWERS OF INDIAN GROUP ORGANIZED UNDER IRA BUT NOT AS HISTORICAL TRIBE

April 15, 1938.

Memorandum to Mr. Zimmerman, Assistant Commissioner of Indian Affairs.

In connection with the matter of calling elections on the constitutions for the Lower Sioux Indian Community and the Prairie Island Indian Community under the Pipestone jurisdiction, the two constitutions and the letters addressed to the two constitutional committees have been revised in this office to accord with certain legal principles.

Neither of these two Indian groups constitutes a tribe but each is being organized on the basis of their residence upon reserved land. After careful consideration in the Solicitor's Office it has been determined that under section 16 of the Indian Reorganization Act a group of Indians which is organized on the basis of a reservation and which is not an historical tribe may not have all of the powers enumerated in the Solicitor's opinion on the Powers of Indian Tribes dated October 25, 1934. The group may not have such of those powers as rest upon the sovereign capacity of the tribe but may have those powers which are incidental to its ownership of property and to its carrying on of business, and those which may be delegated by the Secretary of the Interior.

In the case of these two communities three of the powers listed in the constitutions have been found not to be within the permissible limits of the powers for

such group. These powers were the power to condemn land of members of the community, to regulate the inheritance of the property of members of the community, and to levy taxes upon members of the community. The first two powers were eliminated but the last was modified to restrict it to a permissible scope by allowing the levying of assessments upon members of the tribe for the use of community property and privileges. As these assessments would be incidental to the ownership of community property, it is considered that the community would be privileged to impose them. The reasons for these changes were reported to the Indians in the letters to the constitutional committees. It is believed that the Indians will have no objections to these changes but if they should have they may seek the postponement of the elections as already suggested in the letters addressed to the committees. The remaining powers were found justified on the basis of one of the above-mentioned principles. The power over law and order is made subject to review by the Secretary of the Interior and may be sustained as a delegation of power.

As these changes were legally necessary and did not involve considerations of policy and as there has been prolonged delay in calling the elections for these two communities, the above changes were made in this office without returning the files to the Indian Office. It is requested that you call this memorandum to the attention of the Organization Division in order that the above stated legal principles may be followed

in future cases of organization of Indians upon the basis of residence on a reservation.

Solicitor.

CONSTITUTION AND BYLAWS OF THE PRAIRIE ISLAND INDIAN COMMUNITY IN MINNESOTA

PREAMBLE

We, the Minnesota Mdewakanton Sioux residing on the Prairie Island Reservation under the Pipestone jurisdiction in the State of Minnesota, in order to form a more perfect union, develop our natural resources, insure our domestic tranquillity, promote the general welfare, to enjoy certain rights of home rule, to provide education in schools of higher learning including vocational, trade, high schools, and colleges for our people, and to secure the opportunities offered us under the Indian Reorganization Act, do hereby establish the following Constitution and Bylaws; and we solemnly affirm that it is our earnest intention faithfully to support, respect, and promote the integrity of the Constitution of the United States and the Constitution of the State of Minnesota, together with all laws pertaining thereto which are the constituted authority of our commonwealth.

ARTICLE I – NAME

SECTION 1. The name of this organization shall be the "Prairie Island Indian Community in the State of Minnesota."

ARTICLE II – TERRITORY

SECTION 1. The territory of the Prairie Island Indian Community shall be all the land now held in trust by the United States for the Minnesota Mdewakanton Sioux Indians within the confines of the Prairie Island Indian Reservation, and shall include such other lands as may in the future be acquired within or without said boundary lines by the Department of the Interior or by the Community for our use in the State of Minnesota.

* * *

ARTICLE IX – LAND

SECTION 1. *Land assignments.* – The land within the territory of the Prairie Island Indian Community which was purchased by the United States for the Mdewakanton Sioux residing in the State of Minnesota on May 20, 1886, and their descendants, may be assigned to any Minnesota Mdewakanton Sioux entitled thereto and may not be assigned to any other person although such person is a member of this Community. However, land purchased by or for the Prairie Island Indian Community may be assigned to any member of the Community.

SEC. 2. All applications for the assignment of land shall be made to the Community Council. In the case of an application for an assignment of the land above referred to, bought for certain Mdewakanton Sioux of Minnesota, the Council shall recommend to the Superintendent of the jurisdiction what action shall be taken. If the Superintendent, after consultation

with the Council and the interested parties, disagrees with the final recommendation of the Council, he shall refer the case to the Commissioner of Indian Affairs.

All assignments under this section shall be granted by or under the direction of the Secretary of the Interior, and evidenced by a certificate of assignment, which certificate shall be of the same force and effect as certificates of assignment issued previous to the organization of this Community. Such an assignment shall be known as a "Minnesota Mdewakanton Sioux Assignment."

SEC. 3. In the case of an application for an assignment of land which has been bought by or for this Community, the Council may approve or reject such application. The action of the Council shall be final and such action shall be reported to the Superintendent of the Pipestone jurisdiction within 10 days. An assignment under this section shall be known as a "Community Assignment".

SEC. 4. In any assignment of land, preference shall be given, first, to heads of families of Indian blood who are without land; and, secondly, to heads of families of Indian blood which shall have already received assignments consisting of less than an economic unit of agricultural land or other land of equal value, such economic unit to be determined by the Community Council in ordinances which shall be subject to review by the Secretary of the Interior or his designated representatives. If either the husband

or wife is not of Indian blood, such person is not to be considered as the head of a family under this section.

The Community Council may, if it sees fit, charge a fee of $5 on approval of an assignment made under section 3.

SEC. 5. No family shall at any time hold more than one assignment of land: *Provided, however,* That the Communiy [sic] Council may take into consideration the economic needs of a large and small family, a family being defined as a husband and wife, living together as such, whether there be children or not. In the event of a legal divorce or separation and there be children, the parent who provides for and maintains a home for the children shall be considered as the head of the family.

SEC. 6. If the holder of any land assignment absents himself, with his family, from residence upon his assignment for a period of 2 years, such absence becomes evidence that he has relinquished his claim to such assignment. It shall then be the duty of the Community Council, provided reasonable notice has been given, to declare the assignment vacated and notify the Superintendent of the Pipestone jurisdiction.

Any holder of a land assignment, excepting the aged and disabled within the confines of the corporate area, shall personally cultivate and use said land to the best of his ability, and cooperate with Federal and State experts for the proper development of the land.

SEC. 7. The Community Council may make all further regulations, by ordinances, as shall be necessary governing the use, lease under exceptional conditions, and inheritance of assigned land; *Provided, however,* That such ordinances shall be subject to review by the Secretary of the Interior insofar as they may affect "Minnesota Mdewakanton Sioux Assignments."

SEC. 8. Any holder of a land assignment who willfully neglects to make proper use of his assignment according to the ordinances prescribed by the Community Council governing the use and cultivation of such land, shall have his certificate of assignment subject to cancelation. It shall be the duty of the Community Council to warn such a person of the possibility of the loss of his assignment. If the assignee continues to neglect to make proper use of his land, it shall be the duty of the Community Council to notify the Superintendent of the Pipestone jurisdiction, who shall then take such action as he may deem necessary looking toward the proper cultivation and improvement of the land.

SEC. 9. Any member of this Community who shall transfer any land of which he is the owner to the United States in trust for this Community shall be entitled to an assignment of the same land or of other available land of equal value.

SEC. 10. Improvements of any character made upon assigned land may be willed to and inherited by members of the Prairie Island Indian Community,

and, if the improvements are made upon any "Minnesota Mdewakanton Sioux Assignment", they may also be willed to and inherited by any Minnesota Mdewakanton Sioux Indian entitled to such an assignment. When improvements are not possible of fair division, the Community Council shall dispose of them under such regulations as it may provide for the benefit of such heirs. No permanent improvements may be removed from any community or assigned land without the consent of the Community Council.

SEC. 11. No member of the Prairie Island Sioux Indian Community may use or occupy community lands except under an assignment or lease.

SEC. 12. Unassigned land shall be managed by the Community Council for the benefit of the members of the entire community in accordance with the regulations prescribed by the Secretary of the Interior under Section 6 of the Act of June 18, 1934 (48 Stat. 984).

SEC. 13. Community funds may be used, with the consent of the Secretary of the Interior, to acquire land for the Prairie Island Indian Community.

* * *

CERTIFICATION OF ADOPTION

Pursuant to an order, approved April 23, 1936, by the Secretary of the Interior, the attached Constitution and Bylaws were submitted for ratification to the members of the Minnesota Mdewakantion [sic] Sioux residing on the Prairie Island Reservation

under the Pipestone jurisdiction in the State of Minnesota and were on May 23, 1936, duly adopted by a vote of 35 for, and 4 against, in an election in which over 30 percent of those entitled to vote cast their ballots, in accordance with section 16 of the Indian Reorganization Act of June 18, 1934 (48 Stat. 984), as amended by the Act of June 15, 1935 (49 Stat. 378).

MOSES WELLS
Chairman of Election Board.
WALTER LEITH
Chairman of the Community Council.
GRACE ROUILLARD
Secretary.

J. W. BALMER,
Superintendent

I, Harold L. Ickes, the Secretary of the Interior of the United States of America, by virtue of the authority granted me by the Act of June 18, 1934 (48 Stat. 984), as amended, do hereby approve the attached Constitution and Bylaws of the Minnesota Mdewakanton Sioux residing on the Prairie Island Reservation under the Pipestone jurisdiction in the State of Minnesota.

All rules and regulations heretofore promulgated by the Interior Department or by the Office of Indian Affairs, so far as they may be incompatible with any of the provisions of the said Constitution and Bylaws are hereby declared inapplicable to the members of the Minnesota Mdewakanton Sioux residing on the

Prairie Island Reservation under the Pipestone jurisdiction in the State of Minnesota.

All officers and employees of the Interior Department are ordered to abide by the provisions of the said Constitution and Bylaws.

Approval recommended June 12, 1936
JOHN COLLIER,
Commissioner of Indian Affairs.

HAROLD L. ICKES,
Secretary of the Interior.
[SEAL]

WASHINGTON, *June 20, 1936.*

CONSTITUTION AND BYLAWS OF THE LOWER SIOUX INDIAN COMMUNITY IN MINNESOTA

PREAMBLE

We, the Minnesota Mdewakanton Sioux residing on the Lower Sioux Reservation under the Pipestone jurisdiction in the State of Minnesota, in order to form a more perfect union, develop our natural resources, insure our domestic tranquility, promote the general welfare, to enjoy certain rights of home rule, to provide education in schools of higher learning including vocational, trade, high schools, and colleges for our people, and to secure the opportunities offered us under the Indian Reorganization Act, do hereby establish the following Constitution and Bylaws; and we solemnly affirm that it is our earnest intention faithfully to support, respect and promote the integrity of the Constitution of the United States and the Constitution of the State of Minnesota, together with all laws pertaining thereto which are the constituted authority of our commonwealth.

ARTICLE I – NAME

SECTION 1. The name of this organization shall be the "Lower Sioux Indian Community in the State of Minnesota."

ARTICLE II – TERRITORY

SECTION 1. The territory of the Lower Sioux Indian Community shall be all the land now held in trust by the United States for the Minnesota Mdewakanton Sioux Indians within the confines of the Lower Sioux Indian Reservation, and shall include such other lands as may in the future be acquired within or without said boundary lines by the Department of the Interior or by the Community for our use in the State of Minnesota.

* * *

ARTICLE IX – LAND

SECTION 1. *Land Assignments.* – The land within the territory of the Lower Sioux Indian Community which was purchased by the United States for the Mdewakanton Sioux residing in the State of Minnesota on May 20, 1886, and their descendants, may be assigned to any Minnesota Mdewakanton Sioux entitled thereto, and may not be assigned to any other person although such person is a member of this Community. However, land purchased by or for the Lower Sioux Indian Community may be assigned to any member of the Community.

SEC. 2. All applications for the assignment of land shall be made to the Community Council. In the case of an application for an assignment of the land, above referred to, bought for certain Mdewakanton Sioux of Minnesota, the Council shall recommend to the Superintendent of the jurisdiction what action

shall be taken. If the Superintendent, after consultation with the Council and the interested parties, disagrees with the final recommendation of the Council, he shall refer the case to the Commissioner of Indian Affairs.

All assignments under this section shall be granted by or under the direction of the Secretary of the Interior, and evidenced by a Certificate of Assignment, which certificate shall be of the same force and effect as certificates of assignment issued previous to the organization of this Community. Such an assignment shall be known as a "Minnesota Mdewakanton Sioux Assignment."

SEC. 3. In the case of an application for an assignment of land which has been bought by or for this Community, the Council may approve or reject such application. The action of the Council shall be final and such action shall be reported to the Superintendent of the Pipestone jurisdiction within 10 days. An assignment under this section shall be known as a "Community Assignment."

SEC. 4. In any assignment of land, preference shall be given, first, to heads of families of Indian blood who are without land; and, secondly, to heads of families of Indian blood which shall have already received assignments consisting of less than an economic unit of agricultural land or other land of equal value, such economic unit to be determined by the Community Council in ordinances which shall be subject to review by the Secretary of the Interior or

his designated representatives. If either the husband or wife is not of Indian blood, such person is not to be considered as the head of a family under this section.

The Community Council may, if it sees fit, charge a fee of $5 on approval of an assignment made under section 3.

SEC. 5. No family shall at any time hold more than one assignment of land; *Provided, however*, That the Community Council may take into consideration the economic needs of a large and a small family, a family being defined as a husband and wife, living together as such, whether there be children or not. In the event of a legal divorce or separation and there be children, the parent who provides for and maintains a home for the children shall be considered as the head of the family.

SEC. 6. If the holder of any land assignment absents himself, with his family, from residence upon his assignment for a period of 2 years, such absence becomes evidence that he has relinquished his claim to such assignment. It shall then be the duty of the Community Council, provided reasonable notice has been given, to declare the assignment vacated and notify the Superintendent of the Pipestone jurisdiction.

Any holder of a land assignment, excepting the aged and disabled within the confines of the community area, shall personally cultivate and use said land to the best of his ability, and cooperate with

Federal and State experts for the proper development of the land.

SEC. 7. The Community Council may make all further regulations, by ordinances, as shall be necessary governing the use, lease under exceptional conditions, and inheritance of assigned land; *Provided, however*, That such ordinances shall be subject to review by the Secretary of the Interior insofar as they may affect "Minnesota Mdewakanton Sioux Assignments."

SEC. 8. Any holder of a land assignment who willfully neglects to make proper use of his assignment according to the ordinances prescribed by the Community Council governing the use and cultivation of such land, shall have his assignment subject to cancellation. It shall be the duty of the Community Council to warn such a person of the possibility of the loss of his assignment. If the assignee continues to neglect to make proper use of his land, it shall be the duty of the Community Council to notify the Superintendent of the Pipestone jurisdiction, who shall then take such action as he may deem necessary looking toward the proper cultivation and improvement of the land.

SEC. 9. Any member of this Community who shall transfer any land of which he is the owner to the United States in trust for this Community shall be entitled to an assignment of the same land or of other available land of equal value.

SEC. 10. Improvements of any character made upon assigned land may be willed to and inherited by members of the Lower Sioux Indian Community, and if the improvements are made upon any "Minnesota Mdewakanton Sioux Assignments", they may also be willed to and inherited by any Minnesota Mdewakanton Sioux Indian entitled to such an assignment. When improvements are not possible of fair division, the Community Council shall dispose of them under such regulations as it may provide for the benefit of such heirs. No permanent improvements may be removed from any community or assigned land without the consent of the Community Council.

SEC. 11. No member of the Lower Sioux Indian Community may use or occupy community lands except under an assignment or lease.

SEC. 12. Unassigned land shall be managed by the Community Council for the benefit of the members of the entire Community, in accordance with the regulations prescribed by the Secretary of the Interior under section 6 of the Act of June 18, 1934 (48 Stat. 984).

SEC. 13. Community funds may be used, with the consent of the Secretary of the Interior, to acquire land for the Lower Sioux Indian Community.

* * *

CERTIFICATION OF ADOPTION

Pursuant to an order, approved April 23, 1936, by the Secretary of the Interior, the attached Constitution and Bylaws were submitted for ratification to the members of the Minnesota Mdewakanton Sioux residing on the Lower Sioux Reservation under the Pipestone jurisdiction in the State of Minnesota and were on May 16, 1936, duly approved by a vote of 54 for, and 6 against, in an election in which over 30 percent of those entitled to vote cast their ballots, in accordance with section 16 of the Indian Reorganization Act of June 18, 1934 (48 Stat. 984), as amended by the Act of June 15, 1935 (49 Stat. 378).

GEORGE ST. CLAIR,
Chairman of Election Board.
SAM BLUESTONE,
Chairman of the Community Council.
THOMAS BLUESTONE,
Secretary.

J. W. BALMER,
Superintendent.

I, Harold L. Ickes, the Secretary of the Interior of the United States of America, by virtue of the authority granted me by the Act of June 18, 1934 (48 Stat. 984), as amended, do hereby approve the attached Constitution and Bylaws of the Minnesota Mdewakanton Sioux residing on the Lower Sioux Reservation under the Pipestone jurisdiction in the State of Minnesota.

All rules and regulations heretofore promulgated by the Interior Department or by the Office of Indian Affairs, so far as they may be incompatible with any of the provisions of the said Constitution and Bylaws are hereby declared inapplicable to the members of the Minnesota Mdewakanton Sioux residing on the Lower Sioux Reservation under the Pipestone jurisdiction in the State of Minnesota.

All officers and employees of the Interior Department are ordered to abide by the provisions of the said Constitution and Bylaws.

Approval recommended May 25, 1936.
JOHN COLLIER,
Commissioner of Indian Affairs.

HAROLD L. ICKES,
Secretary of the Interior.
[SEAL]

WASHINGTON, D. C., *June 11, 1936.*

CONSTITUTION
of the
SHAKOPEE MDEWAKANTON SIOUX COMMUNITY
of
MINNESOTA

PURPOSE

We, the Indian people of the Shakopee Mdewakanton Sioux Community, in order to secure the advantages of local self-government for ourselves and our children, do ordain and establish this constitution.

ARTICLE I – TERRITORY

The territory of the Shakopee Mdewakanton Sioux Community shall consist of the four tracts of land located in Scott County, Minnesota, described in Appendix "A" attached hereto, now held in trust by the United States for the Minnesota Mdewakanton Sioux Indians and shall include such other lands as may be legally added thereto. The jurisdiction of the community over such lands shall not be inconsistent with applicable Federal and State laws.

ARTICLE II – MEMBERSHIP

Section 1. The membership of the Shakopee Mdewakanton Sioux Community shall consist of:

(a) All persons of Mdewakanton Sioux Indian blood, not members of any other Indian tribe, band or group, whose names appear on the 1969 census roll of Mdewakanton Sioux residents of the

Prior Lake Reservation, Minnesota, prepared specifically for the purpose of organizing the Shakopee Mdewakanton Sioux Community and approved by the Secretary of the Interior.

(b) All children of at least one-fourth (1/4) degree Mdewakanton Sioux Indian blood born to an enrolled member of the Shakopee Mdewakanton Sioux Community.

(c) All descendants of at least one-fourth (1/4) degree Mdewakanton Sioux Indian blood who can trace their Mdewakanton Sioux Indian blood to the Mdewakanton Sioux Indians who resided in Minnesota on May 20, 1886, Provided, they apply for membership and are found qualified by the governing body, and provided further, they are not enrolled as members of some other tribe or band of Indians.

Sec. 2. The governing body shall have power to pass resolutions or ordinances, subject to the approval of the Secretary of the Interior, governing future membership, adoptions and loss of membership.

* * *

APPROVAL

I, Harrison Loesch, Assistant Secretary of the Interior of the United States of America, by virtue of the authority granted to me by the Act of June 18, 1934 (48 Stat. 984), as amended, do hereby approve the attached Constitution of the Shakopee Mdewakanton Sioux Community of Minnesota.

Approval Recommended:

/s/ TW Taylor
Acting Commissioner of Indian Affairs

/s/ Harrison Loesch
Assistant Secretary of the Interior

Washington, D. C.

Date: Nov 28 1969

INDIAN LAND CERTIFICATE

No. 45

TO ALL WHOM IT MAY CONCERN:

It is hereby certified that Morris Pendleton, (hereinafter termed assignee), who has been established as an eligible Mdewakanton Sioux Indian by reason of being a descendant of a Mdewakanton Sioux Indian who resided in Minnesota on May 20, 1886, or who was in the process of removing hereto and who had severed his or her tribal relations, has hereby been assigned the following described tract of land, viz:

Beginning at the Northwest corner of the SW1/4 SE1/4 Section 2, T. 112N., R. 35W., (1287 feet north of south 1/4 corner Section 2); thence North 2574 feet; thence East 330 feet; thence South 2574 feet; thence West 330 feet to point of beginning.

_____ in Redwood County, Minnesota, containing 19.5 acres, more or less, and subject to the following terms and conditions:

1. Assignee is entitled to immediate possession of the land for his or her lifetime, so long as he or she shall occupy and use the land.

2. The assignment evidence by this certificate is not transferable except by relinquishment to the United States of America or its successor in interest. Any sale, lease, transfer or encumbrance of this assignment, including any attempts to utilize this

assignment as security of any kind, is and will continue to be utterly void and of no effect.

3. The assignment evidence by this certificate shall terminate upon the death of the assignee, upon relinquishment by the assignee in writing or by cancellation by the Secretary of the Interior or his designated representative in the event that the assignee shall cease to use and occupy the land as his or her principal place of residence for a continuous period of 2 years.

4. Any structure placed on the premises by the assignee shall remain his or her personal property so long as this assignment is in effect and may be sold, encumbered, devised or inherited. Upon termination of this assignment, any such structure may be removed from the land within six months after the date of termination of the assignment. In the event that such structure has not been removed within six months after the date of termination of the assignment, or such structure has not been purchased or inherited by an eligible Mdewakanton Sioux Indian, as defined above, who has filed with the appropriate office of the Bureau of Indian Affairs an application for assignment of the land, then such structure shall be declared abandoned and title thereto shall become vested in the United States to be held in the same manner and for the same purpose as the land is held.

5. Upon termination of this assignment by death of the assignee, such land shall not be reassigned to any other eligible Mdewakanton Sioux

Indian for a period of six months after the date of termination to enable appropriate negotiations for acquisition or removal of any structures which may be located thereon. During that period, but in no case for longer than the six-month period, the surviving spouse and/or minor children of the assignee may be permitted to continue to occupy the premises until the structure or structures are either removed, acquired through sale or devise, or declared abandoned.

6. Upon termination of this assignment by death of the assignee, such of the lawful heirs of the assignee as are themselves eligible Mdewakanton Sioux Indians, as defined above, shall be given preference in the reassignment of the land, provided that he, she or they file with the appropriate office of the Bureau of Indian Affairs within six months after the date of termination an application for an assignment on the land accompanied by evidence that he, she or they have secured title to any structure or structures which may have been placed on the land by the assignee.

IN TESTIMONY WHEREOF, I, Robert H. Schoewe, Acting _____, Area Director, Minneapolis Area Office, Bureau of Indian Affairs, have hereunto set my hand and caused the seal of this office to be hereto attached

at the City of Minneapolis, Minnesota, this 13th day of December, ~~1976.~~ 1979.

/s/ Robert H. Schoewe
Acting Area Director
Minneapolis Area Office
Bureau of Indian Affairs

7. The Assignee must occupy the tract as his permanent residence within (12) months of the date of approval of this certificate or it will be subject to cancellation by the Area Director.

COURT OF THE
SHAKOPEE MDEWAKANTON SIOUX COMMUNITY
COUNTY OF SCOTT STATE OF MINNESOTA

LANNY ROSS, Plaintiff, vs. SHAKOPEE MDEWAKANTON SIOUX COMMUNITY, Defendant.	)	Court File No. 013-91

MEMORANDUM OPINION AND ORDER

Summary

In this case, the Court is called upon to consider the validity of an ordinance which, from the record before us, has formed the basis for relative stability within the Shakopee Mdewakanton Sioux Community for a period of nearly four years, in light of Article VI of the Community's Constitution. Because we are asked to overturn an action of the Community's General Council, the question presented is perhaps the most difficult that this Court has faced.

It is made more difficult because of the factual background which underlies the challenged action. For a number of years, before and including 1988, the Community lived in nearly constant turmoil. In no small part this turmoil was a product of three facts: the Community's businesses were generating

substantial monies; a significant share of those monies were being distributed "per capita" to the Community's membership; and the right of various persons to participate in these "per capita" payments repeatedly was disputed by other persons within the Community.

No useful purpose would be served by a recitation of the specifics of that history. Suffice it to say that the files of the Federal courts and Federal agencies, not to mention the file cabinets of many attorneys, are littered with records of disputes which had, at their base, understandable desires on the part of some to participate in the Community's resources, justifiable fears that such participation would be denied by others, and profound doubts that there was any forum which had jurisdiction to respond.

During the period from 1983 to 1988, the Community operated under an Ordinance which mandated that all persons receiving "per capita" payments be residents of the Community's reservation, and that any member who had left the Reservation and returned not receive such payments for a period of one year following their return. In 1988, the Community's General Council took two actions aimed at stilling the fears of persons receiving per capita payments: In the late winter of 1988, it created this Court. And on December 29, 1988, it passed Ordinance No. 12-29-88-002. That ordinance listed the persons who on that date were receiving "per capita" payments, and it stated that, barring two separate affirmative votes of two-thirds of the

Community's membership, those would continue to receive such payments. Ordinance No. 12-29-88-002 also stated that, barring two separate affirmative votes of two-thirds of the Community's membership, no other persons (except certain minors), regardless of their membership in the Community, would in the future be eligible to receive payments.

In this case, this Court – one of the two structures that was established to bring stability to the Community – has been asked to declare that a portion of Ordinance No. 12-29-88-002, the second such structure, violates Article VI of the Constitution of the Shakopee Mdewakanton Sioux Community. In one of the ironies that characterizes much of life, we find that we must do so.

Our holding is narrow, and at least pending further proceedings, it is only prospective in its effect. Specifically, our holding is that, while the Shakopee Mdewakanton Sioux Community could, consistent with Article VI of its Constitution, establish Reservation residency requirements which members would be required to meet before they could receive "per capita" payments, it could not, consistent with Article VI, remove those residency requirements and still deny per capita payments to the members to whom payments were not being made because of their prior absence from the Community's Reservation. Therefore, we today direct the Community to commence making per capita payments to Ross.

We believe that we do not now have before us a record sufficient to decide whether the effect of this order either can or should be made retroactive. We therefore also direct the parties to discuss with the Court a briefing schedule on this issue.

Discussion

The parties agree that there are no disputes with respect to any material facts, and have placed this matter before us on cross motions for summary judgment.

The facts are these: The Plaintiff, Lanny Ross, is a member of the Community. (He notes that he is a "charter member", which is true enough because his name does appear on the roll of the Community developed in 1969, but no consequence flows from this fact because nothing in the Community's governing documents distinguishes the rights of "charter members" from those of other members). When the Community adopted its residency requirements in 1983, Ross did not reside on the Reservation. Therefore, his name did not appear on a list of persons whom the Community deemed to be eligible to receive "per capita" payments at that time. Ross returned to the Community in 1988, but on December 29, 1988, when Ordinance No. 12-29-88-002 was adopted, he had not yet been a resident for twelve months, and therefore was not receiving payments.

With respect to residency and "per capita" payments, Ordinance No. 12-29-88-002 provides:

Section 4 – Reservation Residency Not Required – There shall be no requirement that recipients of per capita payments otherwise qualified shall maintain their residence on the Shakopee Mdewakanton Sioux Community Reservation. Payments and program benefits shall be available to community members and persons otherwise qualified whether or not those persons actually reside on the Shakoopee [sic] Mdewakanton Sioux Community Reservation.

As to the persons who are to [sic] eligible to receive such payments, the Ordinance states:

Section 8 – Final and Exclusive List of Eligible Recipients – The list of persons on the Roll of Adults, and the Roll of Minors and their descendants, shall comprise the final and exclusive list of persons entitled to receive payments and other benefits from the prsent [sic] and future businesses of the Shakopee Mdewakanton Sioux Community. Excepting only those described in Section 6 [which section pertains to certain trusts for minors], no further additions shall be made. No person listed on the Roll of Adults, and no minor child of those persons, now named on the Roll of Minors, and those who may subsequently be certified as qualifying for for [sic] addition to the Rolls pursuant to Section

> 6 of this Ordinance, shal [sic] ever be denied payments or benefits, and the value of the property right of each person on the Roll of Adults and the Roll of Minors shall be maintained at an equal level with the value of the property rights of the others named on those Rolls.

The Roll of Adults included all members of the Community (and some other persons) – save only for four persons whose names appeared on a separate list, denominated "List C – Persons eligible or enrolled for voting membership not now receiving benefits". Those four people were Ross, Charlie Vig, Pat Welch, and Dave Blue. Following the adopting of Ordinance 12-29-88-002, the General Council voted on the question of whether the names on List C should be added to the Roll of Adults. The vote was 21 for, 29 against, with 5 abstaining. Since December 12, 1988, Ross has lived on the Reservation and has been permitted to vote in the General Council and in the Community's elections; but he has not received "per capita" payments.

Article VI of the Community's Constitution provides:

> All members of the community shall be accorded equal opportunities to participate in the economic resources and activities of the community.

The parties have disputed at great length the effect of this provision; but neither party really has

provided a defining explanation for its position. Ross' principal contention is that "per capita" payments are economic resources of the Community, and that the effect of Article VI is to require that he receive an equal distribution of those resources. The difficulty with this argument is that it begs the question. On occasion, in the materials submitted to the Court, Ross appears to assert that under all circumstances Article VI establishes a right to equal distributions among all voting members, with no distinctions being permissible among such members. And he makes variations on this argument, asserting that the Community's denial of payments to him is a denial of a property right without due process of law, in violation of the due process and equal protection guarantees of the Indian Civil Rights Act of 1968. 25 U.S.C. 1302. But those arguments stand or fall on the resolution of the fundamental question. He has a right to protect only if Article VI gives him a right to receive payments.

The Community's arguments also miss the mark to some extent. The Community correctly notes that Article V of the Constitution gives the General Council the authority to "manage all economic affairs and enterprises of the community". But the provisions of Article V do not negate the effect, whatever it may be, of Article VI. The Community stresses the fact that one of the most fundamental powers of an Indian tribe is the power to determine its own membership. But the Community has decided its own membership, and Ross is a member. The question is:

what does Article VI mean for members. The Community asserts that the acceptance of Ross' arguments would mean that each member would be guaranteed an equal share of all Community resources – that the Community could never establish programs, such as education and health care programs, which would distinguish between members based on their need. Ross rejects that argument as a "straw man" (or, in oral argument, as a "straw horse"); but he does not explain what exactly Article VI does mean.

In the view of the Court, however, at least three things are clear.

First, Article VI clearly was not intended to, and does not, preclude the Community from establishing programs based on members' need or on circumstances, or establishing appropriate standards for the dispostion [sic] of the Community's resources. Far more specific language would be required than that used in Article VI, to reach such a result. It is our view that the equal protection analysis generally employed in interpreting the Fourteenth Amendment to the United States Constitution, imposed upon the Community's actions by the Indian Civil Rights Act of 1968, in most cases is probably the appropriate one for interpreting Article VI. The manner in which the "rational relationship" and "strict scrutiny" formulae that traditionally are applied in Fourteenth Amendment cases may change in the context of the Community and its circumstances; but at least the Community's government is not required to be merely

a vessel to pass along all Community property in equal shares to all members.

This leads us to our second conclusion, which is that the Community did not violate either the provisions of Article VI or of the Indian Civil Rights Act when, in 1983, it established both the requirements that a person be a resident of the Reservation in order to receive "per capita" payments, and that members who returned to the Reservation then reside thereon for twelve months before becoming eligible for payments. The Community is tiny, both in terms of its membership and its land base. In 1983, it also was tiny in terms of its resources. It was not an unreasonable choice for the Community to hold its "per capita" payments within the boundaries of the Reservation, where the General Council could reasonably conclude they were most needed. Also, when money suddenly was appearing where it had not been before, it was not unreasonable for the General Council to require members who had left the Reservation to demonstrate a commitment to the Community, in the form of a one-year waiting period, before permitting them to partake of the Community's resources. Therefore, insofar as Ross claims per capita payments from 1983 through December 29, 1988, his claim must fail.

But third, under Article VI, the decision of the General Council on December 29, 1992 to eliminate the residency requirement for most members (to permit them to leave the Reservation and retain their rights to payment), but to retain forever the effect of

the residency requirement on Ross (so that only by two affirmative votes of two-thirds of the Community's entire membership could he participate in payments, regardless of where he lives) is impermissible. It did not have the effect of holding vital monies on the Reservation. To the contrary, since Ross is a resident and is not receiving payments, while many other members who are receiving payments presumably may have left, the effect may well have been the reverse. It also did not have the effect of eliciting a demonstration from anyone to the Community. Indeed, the only apparent effect is to penalize members who happen to have failed to return to the Reservation in time to be eligible to leave again with payments in hand.

No purpose permissible under the "equal opportunities" language of Article VI can possibly be served by such a result. The Court is fully cognizant of the fact that members of the Community may well feel as though their residence on the Reservation during the troubled times preceding December 29, 1988 entitles them to special consideration, as against members who were not on the Reservation at that time. And indeed, they might be correct – if the same residency requirements applied to all members. But when the requirements have been lifted for some, in the view of the Court they must be lifted as to all.

Therefore, it is clear to us that we must order that Ross be given "per capita" payments, commencing immediately. Whether, however, this Court has the authority to order that Ross be compensated for payments he did not receive from December 29, 1988

to the present, and whether – whatever our authority – it is appropriate for us to enter such an order, is a matter we do not now decide. The parties have not briefed this issue, and in our view, considering the amounts that may be at issue, the Court must have the benefit of the parties' views.

ORDER

For the foregoing reasons, it is herewith ORDERED:

1. That the Defendant's Motion for Summary Judgment is granted, insofar as it relates to per capita payments made during the period prior to December 29, 1988; and

2. That the Plaintiff's Motion for Summary Judgment is granted, insofar as it relates to per capita payments made following the date of this Order; and

3. That on or before July 24, 1992, counsel for the parties are directed to inform the Court of their schedule, to permit the Court to establish a briefing schedule with respect to the matters that remain undecided in this litigation.

July 17, 1992

/s/ Kent P. Tupper
Kent P. Tupper
Chief Judge

/s/ John E. Jacobson
John E. Jacobson
Associate Judge

Appropriation Act of June 29, 1888, 25 Stat. at 228

* * *

SIOUX, MEDAWAKANTON BAND.

For the support of the full-blood Indians in Minnesota, belonging to the Medawakanton band of Sioux Indians, who have resided in said State since the twentieth day of May, A.D. eighteen hundred and eighty-six, and severed their tribal relations, twenty thousand dollars, to be expended by the Secretary of the Interior in the purchase, in such manner as in his judgment he may deem best, of agricultural implements, cattle, horses, and lands:

* * *

Appropriation Act of March 2, 1889, 25 Stat. at 992

* * *

SIOUX, MEDAWAKANTON BAND.

For the support of the full-blood Indians in Minnesota, heretofore belonging to the Medawakanton band of Sioux Indians, who have *resided in said State* since the twentieth day of May eighteen hundred and eighty-six, or who were then engaged in removing to said State, and have since resided therein, and have severed their tribal relations, twelve thousand dollars, to be expended by the Secretary of the Interior as follows: Ten thousand dollars in the purchase, as in his judgment he may think best, of such lands,

agricultural implements, seeds, cattle, horses, food, or clothing as may be deemed best in the case of each of these Indians or family thereof; * * * shall be so expended that each of the Indians in this paragraph mentioned shall received [sic], as nearly as practicable, an equal amount in value of this appropriation * * * *And provided further*, That as far as practicable lands for said Indians shall be purchased in such locality as each Indian desires, and none of said Indians shall be required to remove from where he now resides and to any locality or land against his will.

* * *

Appropriation Act of August 19, 1890, 26 Stat. at 340

* * *

SIOUX, MEDAWAKANTON BAND.

For the support of the full and mixed blood Indians in Minnesota heretofore belonging to the Medawakanton band of Sioux Indians, who have resided in said State since the twentieth day of May, eighteen hundred and eighty-six, or who were then engaged in removing to said State, and have since resided therein, and have severed their tribal relations, eight thousand dollars, to be expended by the Secretary of the Interior, as in his judgment he may think best, for such lands, agricultural implements, buildings, seeds, cattle, horses, food, or clothing as may be deemed best in the case of each of these

Indians or families thereof: * * * shall be so expended that each of the Indians in this paragraph mentioned shall receive, as nearly as practicable, an equal amount in value of this appropriation: *And provided further*, That, as far as practicable, lands for said Indians shall be purchased in such locality as each Indian desires, and none of said Indians shall be required to remove from where he now resides and to any locality or land against his will.

* * *

Act of December 19, 1980,
Pub.L. No. 96-557, 94 Stat. 3262

An Act to provide that certain land of the United States shall be held by the United States in trust for certain communities of the Mdewakanton Sioux of Minnesota.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all right, title, and interest of the United States in those lands (including any structures or other improvements of the United States on such lands) which were acquired and are now held by the United States for the use or benefit of certain Mdewakanton Sioux Indians under the Act of June 29, 1888 (25 Stat. 217); the Act of March 2, 1889 (25 Stat. 980); and the Act of August 19, 1890 (26 Stat. 336), are hereby declared to hereafter be held by the United States – ,

(1) with respect to the some 258.25 acres of such lands located within Scott County, Minnesota, in trust for the Shakopee Mdewakanton Sioux Community of Minnesota;

(2) with respect to the some 572.5 acres of such lands located within Redwood County, Minnesota, in trust for the Lower Sioux Indian Community of Minnesota; and

(3) with respect to the some 120 acres of such lands located in Goodhue County, Minnesota, in trust

for the Prairie Island Indian Community of Minnesota.

Sec. 2. The Secretary of the Interior shall cause a notice to be published in the Federal Register describing the lands transferred by section 1 of this Act. The lands so transferred are hereby declared to be a part of the reservations of the respective Indian communities for which they are held in trust by the United States.

Sec. 3. Nothing in this Act shall (1) alter, or require the alteration, of any rights under any contract, lease, or assignment entered into or issued prior to enactment of this Act, or (2) restrict the authorities of the Secretary of the Interior under or with respect to any such contract, lease, or assignment.

1934 Indian Reorganization Act

* * *

25 U.S.C. § 462

The existing periods of trust placed upon any Indian lands and any restriction on alienation thereof are extended and continued until otherwise directed by Congress.

25 U.S.C. § 463

(a) Protection of existing rights

The Secretary of the Interior, if he shall find it to be in the public interest, is hereby authorized to restore to tribal ownership the remaining surplus lands of any Indian reservation heretofore opened, or authorized to be opened, to sale, or any other form of disposal by Presidential proclamation, or by any of the public-land laws of the United States: *Provided, however,* That valid rights or claims of any persons to any lands so withdrawn existing on the date of the withdrawal shall not be affected by this Act . . .

* * *

25 U.S.C. § 465

The Secretary of the Interior is authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee

be living or deceased, for the purpose of providing land for Indians.

* * *

Title to any lands or rights acquired pursuant to this Act or the Act of July 28, 1955 (69 Stat. 392), as amended (25 U.S.C. § 608 et seq.) shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

* * *

25 U.S.C. § 479

The term "Indian" as used in this Act shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendents of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood . . . The term "tribe" wherever used in this Act shall be construed to refer to any Indian tribe, organized band, pueblo, or the Indians residing on one reservation. The words "adult Indians" wherever used in this Act shall be construed to refer to Indians who have attained the age of twenty-one years.

62 Fed.Cl. 521

United States Court of Federal Claims.
Sheldon Peters WOLFCHILD, et al., Plaintiffs,
v.
UNITED STATES, Defendant.

No. 03-2684L.

Oct. 27, 2004.

Erick G. Kaardal, Mohrman & Kaardal, P.A., Minneapolis, MN, for plaintiffs. With him on the briefs were William F. Mohrman and Eric L. Lipman.

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Joe Halloran, Jacobsen, Buffalo, Schoessler & Magnuson, Ltd., St. Paul, MN for amicus curiae Prairie Island Indian Community in Minnesota.

Raymond Cermak, Sr., Vadnais Heights, MN, pro se, as amicus curiae.

OPINION AND ORDER

LETTOW, Judge.

This dispute concerns the United States' management of property originally provided for the benefit of those Mdewakanton Sioux who were loyal to the United States during the Sioux Outbreak in Minnesota during 1862. The property at issue consists of land, improvements to land, and monies derived from special funds provided by the United States in appropriations statutes enacted in 1888, 1889, and 1890. For approximately ninety years, the property acquired by and generated from the specially appropriated funds was maintained by the United States for the use and benefit of the loyal Mdewakanton and their lineal descendants. However, in 1980, a statute was enacted that was used by the Department of Interior as a basis for disbursing the property to three Indian communities that are not exclusively comprised of lineal descendants of the loyal Mdewakanton. Non-descendants allegedly comprise a majority of the members of two of the communities. The plaintiffs aver they are lineal descendants of the loyal Mdewakanton, and they bring before the court claims of breach of fiduciary duty and contract by the United States. The government has filed a motion to dismiss, arguing that this court lacks subject matter jurisdiction and that the complaint fails to state a claim upon which relief may be granted. Plaintiffs have filed a cross-motion for partial summary judgment that a trust exists for the benefit of the lineal descendants, that the government has

breached its fiduciary duties, and that a contract exists and has been breached.

Over 250 individuals are currently named plaintiffs in this action. The plaintiffs have filed a motion for leave to amend their complaint to include yet additional named and anonymous plaintiffs, claiming with respect to the anonymous plaintiffs that a substantial number of them are members of the communities that now hold the property, that the remainder of them are applicants for membership, and that their membership status in those communities would be put in jeopardy if disclosure were to be made that they were plaintiffs in this action.

Motions for leave to participate as *amicus curiae* have been filed on behalf of each of the three Indian communities that have succeeded to property at issue in this case, *viz.*, the Lower Sioux Indian Community in Minnesota, the Shakopee Mdewakanton Sioux (Dakota) Community, and the Prairie Island Indian Community in Minnesota. The movant communities seek to inform the court of the basis for their interest in the property and their interest in preserving their alleged authority as sovereigns over the property. Plaintiffs oppose these motions. In addition, one individual, Raymond Cermak, Sr., has moved for leave to participate as an *amicus curiae*, averring that he is a lineal descendant of the loyal Mdewakanton and that he previously received direct payments of trust monies from the government as a lineal descendant. Plaintiffs also oppose Mr. Cermak's motion.

For the reasons stated below, the government's motion to dismiss is granted in part and denied in part. The plaintiffs' cross-motion for partial summary judgment is also granted in part and denied in part. The plaintiffs' motion for leave to amend their complaint is granted, as is the motion for leave for some plaintiffs to participate anonymously. The motions by each of the communities to participate as *amicus curiae* are granted as is the motion by Raymond Cermak, Sr.

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BACKGROUND[1]

The 1862 Sioux Outbreak

Prior to 1862, the Minnesota Sioux consisted of four bands known as the Mdewakanton and the Wahpakoota (together comprising the "lower bands"), and the Sisseton and the Wahpeton (known as the "upper bands" or the "Santee Sioux"), all of whom lived along the Minnesota River. *See Medawakanton and Wahpakoota Bands of Sioux Indians v. United States,* 57 Ct.Cl. 357, 359-61, 1922 WL 1863 (1922).[2] In August of 1862, young traditionalists in these four bands waged war against the United States, killing more than 500 white settlers and damaging substantial property. *See id.* at 362; *see also* Pls.' Ex. 36, at 187 (William Watts Folwell, *A History of Minnesota* (vol.II, 1924)). After defeating the bands, the United States punished the Sioux by nullifying its treaties with them, among other things voiding annuities that had been granted as part of the terms of the

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[1] The facts set forth do not constitute findings of fact by the court. They are drawn from the Plaintiffs' Complaint ("Compl.") and First Amended Complaint ("Am.Compl."), the recitations of the parties in their oral arguments, motions, responses, replies, and other briefs, and from the materials provided to the court by *amici curiae*. The factual recitation has been presented to provide a basis for analysis of the issues raised in this case.

[2] The Minnesota Sioux were also known as the Sioux of the Mississippi. By contrast, the Teton, Yankton, and Yanktonais Sioux were known as the Sioux of the Missouri.

treaties. *See* Act of Feb. 16, 1863, 12 Stat. 652.[3] The government also moved the Sioux to tracts of unoccupied land outside the limits of the then-existing states, including Minnesota and Iowa, which originally resulted in their moving to Dakota Territory. *Medawakanton*, 57 Ct.Cl. at 364-65. In February 1866, they relocated to a new reservation in Nebraska. *Id.*

Some of the Sioux, however, had been loyal to the United States during the Sioux Outbreak, and these loyalists were permitted to stay on the Minnesota lands provided for the Sioux under the treaties. After

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[3] An annuity had been granted in perpetuity pursuant to a treaty made by the United States with certain chiefs and bands of the Sioux, perhaps only the Mdewakanton Band, on September 29, 1837. *See* 7 Stat. 538. A separate treaty was made between the United States and the Mdewakanton and Wahpakoota Bands of the Minnesota Sioux on August 5, 1851, 10 Stat. 954, which, among other things, provided for a supplemental annuity payable for a fifty-year term. *See Medawakanton*, 57 Ct.Cl. at 360-61. The Sisseton and Wahpeton Bands signed a comparable treaty on July 23, 1851. *Id.*

After the treaties were nullified, the annuities ceased. *Id.* Eventually, however, the tribal bands recovered the present value of the annuities: the Sisseton and Wahpeton Bands by a 1906 Act of Congress enabling them to sue in the Court of Claims and by a judgment in *Sisseton and Wahpeton Bands v. United States*, 42 Ct.Cl. 416, 432[, 1907 WL 895] (1907), and the Mdewakanton and Wahpakoota through a special act of Congress approved March 4, 1917 and a consequent case in the Court of Claims. *See* 39 Stat. 1195 ("An act for the restoration of annuities to the Medawankanton and Wahpakoota (Santee) Sioux Indians, declared forfeited by the Act of February 16, 1863"); *Medawakanton*, 57 Ct.Cl. at 358.

Congress stripped the Sioux of their Minnesota lands, it authorized the Department of Interior to allocate up to eighty acres of that land to each loyalist:

> [T]he Secretary of the Interior is hereby authorized to set apart of the public lands, not otherwise appropriated, eighty acres in severalty to each individual of the before-named bands who exerted himself in rescuing whites from the late massacre [by] said Indians. The land so set apart . . . shall be an inheritance to said Indians and their heirs forever.

Act of Feb. 16, 1863, 12 Stat. at 654. Recognizing further that many of the loyal Sioux had lost their homes and property because of their aid to whites, and that "now they cannot return to their tribe . . . or they would be slaughtered for the part they took in the outbreak," Cong. Globe, 38th Cong., 1st Sess. 3516 (1864), Congress appropriated $7500 for the loyal Sioux in 1865. Act of Feb. 9, 1865, 13 Stat. 427.

The 1886 Census and the 1888, 1889, and 1890 Appropriations Acts

The allocation of land to the loyal Sioux was not successfully implemented, and Congress further provided for the loyal Mdewakanton in 1888, when it authorized the Department of Interior to expend funds for them. Congress recognized that when it declared the Sioux's treaties, annuities, and allocation of land forfeited, it failed to make an exception for the loyal Mdewakanton, whose annuity was valued at

approximately $1,000,000. 19 Cong. Rec. H2976-77 (daily ed. Apr. 14, 1888) (statement of Rep. MacDonald). As a result of this oversight, many loyal Mdewakanton were rendered homeless. *Id.* at 2977. The 1888 Act provided an appropriated amount of $20,000 to be spent by the Secretary of Interior in purchasing land, cattle, horses, and agricultural implements for those full-blooded Mdewakanton who resided in Minnesota on May 20, 1886 and who had severed their tribal relations.[4] Because of the administrative difficulty of determining which Mdewakanton were loyal during the Sioux Outbreak, Congress determined that presence in Minnesota on May 20, 1886 served as an adequate proxy for "friendliness." Pls.'

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[4] The statutory text pertaining to the loyal Mdewakanton provided as follows:

> For the support of the full-blood Indians in Minnesota, belonging to the Medawakanton band of Sioux Indians, who have resided in said State since the twentieth day of May, A.D. eighteen hundred and eighty-six, and severed their tribal relations, twenty thousand dollars, to be expended by the Secretary of the Interior in the purchase, in such manner as in his judgment he may deem best, of agricultural implements, cattle, horses, and lands: *Provided,* That of this amount the Secretary if he may deem it for the best interests of said Indians, may cause to be erected for the use of the said Indians at the most suitable location, a school house, at a cost not exceeding one thousand dollars: *And provided also,* That he may appoint a suitable person to make the above-mentioned expenditures under his direction, the expense of the same to be paid out of this appropriation.

Act of June 29, 1888, 25 Stat. 217, 228-29.

Ex. 16 (Memorandum from Nat'l Tech. Servs. Found. to Bureau of Indian Affairs (October 1979)).

A similar appropriation act in 1889 added a further sum of $12,000 and included a provision calling for each loyal Mdewakanton to receive as close to an equal amount as practicable. Act of Mar. 2, 1889, 25 Stat. 980, 992-93.[5] In a third appropriation

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[5] The pertinent portion of the 1889 appropriation act reads as follows:

> For the support of the full-blood Indians in Minnesota heretofore belonging to the Medawakanton band of Sioux Indians, who have resided in said State since the twentieth day of May eighteen hundred and eighty-six, or who were then engaged in removing to said State, and have since resided therein, and have severed their tribal relations, twelve thousand dollars, to be expended by the Secretary of the Interior as follows: Ten thousand dollars in the purchase, as in his judgment he may think best, of such lands, agricultural implements, seeds, cattle, horses, food, or clothing as may be deemed best in the case of each of these Indians or family thereof; one thousand dollars, or so much thereof as may be necessary, to defray the expenses of expending the money in this paragraph appropriated; and one thousand dollars for the completion and furnishing of the schoolhouse for said Indians authorized by [the 1888 Act]: *Provided,* That if the amount in this paragraph appropriated . . . shall not be expended within the fiscal year for which either sum was appropriated, neither shall be covered into the Treasury, but shall, notwithstanding, be used and expended for the purposes for which the same amount was appropriated and for the benefit of the above-named Indians: *And provided also,* That the Secretary of the Interior may appoint a suitable person to make the above-mentioned expenditure under

(Continued on following page)

act in 1890, Congress added $8,000 and adopted the same substantive provisions as the 1889 Act, except that it expressly stated that the further appropriated amount was to support Indians of both "full and mixed blood." Act of Aug. 19, 1890, 26 Stat. 336, 349. Overall, the value of the appropriations amounted to $20,000 awarded in 1888, $12,000 in 1889, and $8,000 in 1890. The latter two acts called for funds to carry over if the Department of Interior did not spend them by the end of the fiscal year, ensuring that the loyal Mdewakanton would benefit from the appropriation.[6]

To ascertain which Mdewakanton lived in Minnesota on May 20, 1886, U.S. Special Agent Walter McLeod took a census listing all of the full-blood

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> his direction; and all of said money which is to be expended for lands, cattle, horses, implements, seeds, food, or clothing shall be so expended that each of the Indians in this paragraph mentioned shall received [sic], as nearly as practicable, an equal amount in value of this appropriation and that made by said act of June twenty-ninth, eighteen hundred and eighty-eight: *And provided further,* That as far as practicable lands for said Indians shall be purchased in such locality as each Indian desires, and none of said Indians shall be required to remove from where he now resides and to any locality against his will.

Id.

[6] Appropriations to the loyal Mdewakanton under the 1888, 1889, and 1890 Acts were subtracted from the damage award entered in favor of the Mdewakanton in 1922 by the Court of Claims in recompense for the nullified annuities. *Medawakanton*, 57 Ct.Cl. at 367.

Mdewakanton, which was mailed to the Commissioner of Indian Affairs on September 2, 1886. *See* Pls.' Ex. 1 (Enrollment of the Medawankanton Band of Sioux Indians of Minnesota); Pls.' Ex. 15 (Letter from Special Agent Walter McLeod to Commissioner of Indian Affairs (Sept. 2, 1886)). Although the census was not prepared as of May 20, 1886, inclusion on the McLeod list has been deemed to create a rebuttable presumption that an individual met the requirements of the subsequent 1888, 1889, and 1890 Acts. *See, e.g.*, Pls.' Ex. 20, at 2 (Memorandum from the Acting Associate Solicitor to the Field Solicitor (Aug. 19, 1971)). On January 2, 1889, Robert B. Henton, Special Agent for the Bureau of Indian Affairs, took a second census of those Mdewakanton living in Minnesota since May 20, 1886. *Id.* This second census was done at the request of the Secretary of the Interior, who wanted "information as complete as possible." Pls.' Ex. 17, at 2 (Letter from Secretary of Interior to Commissioner of Indian Affairs (Oct. 12, 1888)). The McLeod and Henton listings (together, "the 1886 census") were used to determine who would receive the benefits of the amounts appropriated under the 1888, 1889, and 1890 Acts.

The funds provided by these Acts were used for the purchase of land, agricultural implements, livestock, and goods for the loyal Mdewakanton. The lands purchased were commonly called the "1886 lands" to reflect the effective date of the census that defined the beneficiaries. The lands were purchased in three separate areas of Minnesota, and by 1980

they consisted of (1) approximately 260 acres in Scott County (the "Shakopee" lands), (2) approximately 575 acres in Redwood County (the "Lower Sioux" lands), and (3) approximately 120 acres in Goodhue County (the "Prairie Island" lands). H.R.Rep. No. 96-1409, at 4 (1980).[7]

Trust Creation and Land Assignments

Rather than conveying the acquired land directly to the loyal Mdewakanton for whom the land had been purchased, the Department of Interior, fearing sale or destruction of the property, kept title in the

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[7] Three prior acts had also allocated funds for the purchase of lands. *See* Act of July 4, 1884, 23 Stat. 1887; Act of Mar. 3, 1885, 23 Stat. 375; Act of May 15, 1886, 24 Stat. 39. The 1884 and 1885 Acts expressly required the beneficiaries to be "those of the Mdewakanton Band, who remained faithful to the whites during the outbreak of 1862-3 . . . and for the descendants of those friendly Indians." Def.'s Ex. 4, at 275 n.4 (Roy W. Meyer, *History of the Santee Sioux* (1993)) ("*History of the Santee*"). Walter McLeod was appointed on October 16, 1886 to purchase the lands, and he paid $4,103 for 339.70 acres of land. Pls.' Ex. 23, at 111 (1891 Comm'r of Indian Affairs Ann. Rep.). Much of this land was deeded to individual Indians in fee simple. *History of the Santee* at 279. Some of the beneficiaries sold the land, mortgaged it, or removed its resources. *Id.* at 283; Pls.' Ex. 18, at 3 (Letter from Ass't Comm'r of Indian Affairs to Sec'y of Interior (Sept. 30, 1915)). Robert Henton was appointed on October 20, 1888 to make additional purchases, and he spent $16,581.42 in acquiring 1, 100.99 acres of land. Pls.' Ex. 23, at 111 (1891 Comm'r of Indian Affairs Ann. Rep.). This land was retained by the United States on behalf of the Mdewakanton to avoid repeating the sale, mortgage, and depletion of prior lands. *History of the Santee* at 283.

United States' name but made arrangements for the lands to be made available to the loyal Mdewakanton. The mechanism chosen for that purpose was an assignment system by which a specific parcel of land would be assigned to a particular beneficiary who could use and occupy the land as long as he or she wanted, but if the assignee did not use it for two years, it would be reassigned. Because the legislation called upon the Secretary of Interior to expend the funds as he deemed best, and in the absence of legislation requiring transfer of title, the assignment policy persevered over the years. *See, e.g.*, Pls.' Ex. 18, at 6 (Letter from Assistant Comm'r of Indian Affairs to Sec'y of Interior (Sept. 30, 1915)).

Some of the land purchased for the Mdewakanton was not arable; one parcel was next to a brickyard where many Mdewakanton worked, and its only usable resource was clay. At the request of the Mdewakanton, Congress considered a bill permitting the Secretary of Interior to sell this tract of land. In debating an amendment to require each Mdewakanton's consent to the sale, which ultimately passed, Senator Pettigrew argued that "[i]t is not an Indian reservation. These Indians own the homes, and they have a right there greater than that of reservation Indians. The land was purchased for their benefit, and the title is in them subject to a provision by which they can not convey it." 34 Cong. Rec. 2523 (1901). The bill providing for the land sale was enacted, and the Secretary was empowered to sell the land provided that "the written consent of the adult

Indians residing in Redwood County, Minnesota, shall first be given." Act of Feb. 25, 1901, 31 Stat. 805, 806. The 1901 Act effectively constituted an explicit recognition by Congress that a trust had been created and funded by the appropriations made under the 1888, 1889, and 1890 Acts. By requiring the consent of the beneficiaries for partial termination of the trust, Congress implemented a basic precept of traditional trust law. *See Restatement (Third) of Trusts* § 65(1).

In carrying forward with its responsibilities respecting the 1886 lands, the Department of Interior provided documentary evidence of land assignments to assignees. Indian Land Certificates described the tracts of land, certified that the particular individual "and his heirs are entitled to immediate possession of said land, which is to be held in trust, by the Secretary of the Interior, for the exclusive use and benefit of the said Indian, so long as said allottee or his or her heirs occupy and use said land." Pls.' Ex. 35 (Indian Land Certificate of Harry Bluestone (June 1, 1905)). If the land were to be abandoned for a period of time, usually two years, then the land would be reassigned to another beneficiary; any sale, transfer, or encumbrance of the land other than to the United States was void. *Id.* Although not guaranteed by the assignment, in practice an assignee's land would pass directly to his children upon his death, but other relatives needed to follow procedures established by the Bureau of Indian Affairs to receive an assignment. *See* Pls.' Ex. 34 at 2, 22 (*Smith v. Bureau of*

Indian Affairs, Indian Probate No. IP TC 389S-81 (1990)).

Evolution of the Three Communities

In 1934, the Indian Reorganization Act changed the federal government's relationships with Indian tribes. Act of June 18, 1934, 48 Stat. 984 (also known as the Wheeler-Howard Act) (codified at 25 U.S.C. §§ 461, 462, 463, 464, 465, 466 to 470, 471 to 473, 474, 475, 476 to 478, and 479). Primarily, this Act was designed to permit Native Americans to form federally-recognized tribes and to transfer the functions of the Department of Interior and the Office of Indian Affairs regarding reservations to the tribes. *See Indian Reorganization Act: Hearings on H.R. 7902 Before the House Comm. on Indian Affairs,* 73d Cong. 1 (1934). Pursuant to the Act, the Mdewakanton and others formed three communities: the Shakopee Mdewakanton Sioux Community, the Prairie Island Indian Community, and the Lower Sioux Indian Community. *See, e.g.,* Shakopee and Prairie Island *Amici* Br. Ex. A. (Constitution & Bylaws of Prairie Island Indian Community). The communities were and are not exclusively comprised of descendants of loyal Mdewakanton, nor were nor are all descendants members of one of the communities. *See* Pls.' Ex. 30, at 2 (Letter for the Field Solicitor to the Minneapolis Area Dir. of the Bureau of Indian Affairs (Nov. 8, 1978)).

In theory, the Indian Reorganization Act should not have affected the rights of the lineal descendants of the loyal Mdewakanton because it established that "[t]he existing periods of trust placed upon any Indian lands and any restriction on alienation thereof are extended and continued until otherwise directed by Congress." 25 U.S.C. § 462. However, a memorandum dated January 25, 1955 from the Minneapolis Area Office of the Bureau of Indian Affairs listed regulations for the issuance of such assignments that gave some effect to the Indian Reorganization Act. If an individual wanted to apply for an assignment of land, he or she first had to file an application with the Indian Community Council of the community with jurisdiction over the land. Pls.' Ex. 25 (1955 Minneapolis Area Office Indian Affairs Manual, Supp. No. 11). Next, the community would forward the application to the Superintendent with recommendations about the action to be taken. The Superintendent would ensure that the applicant was an eligible beneficiary of the loyal Mdewakanton land. *Id.* Upon approval, the Superintendent would forward it to the Area Director for assignment. The solicitation of recommendations by the local communities was "a courtesy only and [was] by no means a legal necessity, since the communities have no decision making authority concerning use of these lands." Pls.' Ex. 30, at 2 (Letter for the Field Solicitor to the Minneapolis Area Dir. of the Bureau of Indian Affairs (Nov. 8, 1978)).

Over time, the communities acquired lands in addition to the 1886 lands. This additional land was interspersed among the 1886 lands, resulting in a "checkerboard pattern." H.R.Rep. No. 96-1409, at 6 (1980). The additional land was not subject to the assignment process that applied to the 1886 lands, which were available only to lineal descendants of the loyal Mdewakanton. S.Rep. No. 96-1047, at 2 (1980). If no eligible Mdewakanton took an assignment, the Secretary of Interior could lease the land for fair market value, with the proceeds from the lands deposited by the Department of Interior in accounts held for the benefit of the lineal descendants. *See* Pls.' Ex. 29, at 5-6 (Memorandum to Comm'r of Indian Affairs from Acting Assoc. Solicitor, Indian Affairs (March 19, 1974)); Hr'g Tr. 105-06.[8] Thus, the trust principal came to consist of land, appurtenances to land, and monies, all deposited for the benefit of the lineal descendants.

Membership in the communities also gave rise to significant issues. Over the years, the communities gained a great deal of discretion in determining who kept or attained membership. *See* Pls.' Ex. 29, at 3 n.2 (Memorandum to Commissioner of Indian Affairs from Acting Associate Solicitor, Indian Affairs (March 19, 1974)) ("The persons comprising the membership

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[8] The March 1974 Memorandum explicated in considerable detail the origins of the trust in the Appropriation Acts of 1888, 1889, and 1890, and the ensuing responsibilities of the Secretary of Interior as trustee.

in those organizations[, *i.e.*, the communities] are not all Mdewakanton."). Because the Department of Interior recognized the importance of the communities' right to self-government and the right to determine their own membership, a lineal descendant of a loyal Mdewakanton might be denied admission to, or removed from, membership in a community even if the descendant lived on 1886 land encompassed by the community boundary. Pls.' Ex. 33, at 2 (Letter from Bureau of Indian Affairs, Midwest Reg'l Office to Anonymous Mdewakanton (Aug. 20, 2001)).

Prior to the 1980 Act, the Department of Interior consistently treated the 1886 lands as being held in trust for the exclusive benefit of the loyal Mdewakanton and their descendants. The language in Land Certificates for the 1886 lands noted that such land "is to be held in trust, by the Secretary of the Interior, for the exclusive use and benefit of the said Indian." Pls.' Ex. 35 (Indian Land Certificate of Harry Bluestone) (June 1, 1905). This treatment continued in 1978, when a Field Solicitor stressed that "none of the three Community governments, organized under the Indian Reorganization Act and operating under constitutions and bylaws, has any right, title or interest in these lands. The land is held for the benefit of a specific class of people and their descendants." Pls.' Ex. 30, at 1-2 (Letter for the Field Solicitor to the Minneapolis Area Dir. of the Bureau of Indian Affairs (Nov. 8, 1978)).

The 1980 Act

By 1980, the communities sought greater control over the use of the lands. The constitution and bylaws for each of the communities had established two classes of members: (1) "all members of the community who were entitled to the benefits of the tribal lands acquired under the Reorganization Act and [2] members who were descendants of the 1886 Mdewakanton and who had exclusive rights to the benefits of the 1886 lands." H.R.Rep. No. 96-1409, at 2 (1980). A legislative proposal was made to Congress to eliminate this distinction and to confer greater control on the communities. The proposal was introduced in the House as H.R. 7147 by Rep. Richard Nolan of Minnesota on April 23, 1980 and was referred to the House Committee on Interior and Insular Affairs. *See* 126 Cong. Rec. 8864 (1980). The bill addressed the 1886 lands specifically and would have conveyed the United States' interest in those lands to the United States in trust for the three communities. *See* 126 Cong. Rec. 29785-86 (1980). The Department of Interior issued a favorable report to the House Committee on the bill, making only one suggestion about language. The Department requested that the bill include a generic description of the 1886 lands and that publication of a legal description of the lands involved be subsequently made in the *Federal Register.* That suggestion was made "to avoid the need to include in the bill a detailed land description that is both cumbersome and subject to inadvertent error." H.R.Rep. No. 96-1409, at 6 (Letter from Thomas W.

Frederick, Assistant Sec'y of Interior, to Hon. Morris K. Udall (Sept. 9, 1980)). The Congressional Budget Office advised that the bill made a "technical change in the status" of the lands and "that no additional cost to the government would be incurred as a result of enactment of th[e] legislation." *Id.* at 3 (Letter from Alice M. Rivlin, Dir. of Cong. Budget Office, to Hon. Morris K. Udall (Sept. 11 1980)). Upon consideration by the House Committee on Interior and Insular Affairs, H.R. 7147 was amended to include a 40 acre tract that had been inadvertently omitted and a requirement that the Secretary of Interior publish a description of the lands in the *Federal Register*. H.R. 7147 then was reported favorably out of Committee by voice vote on September 26, 1980. H.R.Rep. No. 96-1409, at 2. In its report, the Committee found that the "distinction [in membership of the communities] has severely hampered the tribal efforts to achieve self-determination." *Id.* H.R. 7147, as amended by the Committee, was passed by the House on the consent calendar on November 17, 1980, without recorded or voice vote. *See* 126 Cong. Rec. 29, 785-86 (1980).

There was no comparable bill in the Senate. When the Senate received H.R. 7147 on Nov. 19, 1980, it was referred to the Senate Select Committee on Indian Affairs. S.Rep. No. 96-1047, at 2-3 (1980). This Committee reported the bill favorably by a unanimous poll of its members. *Id.* at 3. The Senate Report noted that the 1886 lands had been "acquired by the United States for the use and benefit" of the loyal Mdewakanton, but that under the proposed bill

"all right, title, and interest in such lands would be declared instead to be held by the United States in trust for three Minnesota Sioux tribal Communities." *Id.* at 1. A stated reason for the bill was that the land assignments made to the descendants "are not encumberable documents that can be used in securing loans from commercial institutions." *Id.* at 6. H.R. 7147 was passed by the Senate on December 8, 1980, by unanimous consent. *See* 126 Cong. Rec. 32,898 (1980).

Thus, H.R. 7147 was passed by Congress during a lame-duck session held after the November 1980 elections. President Carter signed the bill into law on December 19, 1980, very near the close of his presidency. The full statutory text of the Act is as follows:

An Act

To provide that certain land of the United States shall be held by the United States in trust for certain communities of the Mdewakanton Sioux in Minnesota.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all right, title, and interest of the United States in those lands (including any structures or other improvements of the United States on such lands) which were acquired and are now held by the United States for the use or benefit of certain Mdewakanton Sioux Indians under the Act of June 29, 1888 (25 Stat. 217); the Act of March 2, 1889 (25 Stat.

980); and the Act of August 19, 1890 (26 Stat. 336), are hereby declared to hereafter be held by the United States –

(1) with respect to the some 258.25 acres of such lands located within Scott County, Minnesota, in trust for the Shakopee Mdewakanton Sioux Community of Minnesota;

(2) with respect to the some 572.5 acres of such lands located within Redwood County, Minnesota, in trust for the Lower Sioux Indian Community of Minnesota; and

(3) with respect to the some 120 acres of such lands located in Goodhue County, Minnesota, in trust for the Prairie Island Indian Community of Minnesota.

SEC. 2. The Secretary of the Interior shall cause a notice to be published in the Federal Register describing the lands transferred by section 1 of this Act. The lands so transferred are hereby declared to be a part of the reservations of the respective Indian communities for which they are held in trust by the United States.

SEC. 3. Nothing in this Act shall (1) alter, or require the alteration, of any rights under any contract, lease, or assignment entered into or issued prior to enactment of this Act, or (2) restrict the authorities of the Secretary of the Interior under or with respect to any such contract, lease, or assignment.

Pub.L. No. 96-557, 94 Stat. 3262 (1980).

The 1980 Act, read literally, transferred whatever title the United States had in the 1886 lands from the United States to the United States in trust for the three communities. The 1980 Act failed to address what title the United States had in the 1886 lands. The Act also was silent as to the beneficial interest of the loyal Mdewakanton and their lineal descendants except that a savings clause preserved the rights of existing assignees. *Id.* § 3. In short, the 1980 Act addressed the trust relationship in existence regarding the 1886 lands only in a backhanded minor way through the limited savings clause. The 1980 Act also was silent as to the 1886 monies held by the Department of Interior for the benefit of the lineal descendants.

The extraordinarily poor drafting reflected in the 1980 Act did not slow its implementation by the Department of Interior. In a letter from the Acting Area Director of the Bureau of Indian Affairs dated January 15, 1981 to the Chairman, Community Council, Lower Sioux Community, the Department of Interior took the position that the 1886 lands and 1886 monies held by Interior would be treated as "tribally-owned" property, *i.e.*, it would now be controlled by the Community without reference to the 1886 restriction. Lower Sioux *Amicus* Br.App. 3. (Letter from David Granum to Leon Columbus (Jan. 15, 1981)). This interpretation was confirmed by a letter from the Field Solicitor to the Area Director dated February 6, 1981. Lower Sioux *Amicus* Br.App.

4 (Letter from Elmer T. Nitzschke to Edwin Demery (Feb. 6, 1981)). The Field Solicitor's letter addresses four topics of importance to the Department in implementing the 1980 Act: (1) the steps needed to transfer title to the 1886 lands, (2) the effect of the savings clause to the 1980 Act, (3) the disposition of 1886 monies, and (4) the desirability of preparing an inventory of the 1886 lands, monies, and other property being transferred.

As to title, the Field Solicitor indicated that transfer could not be effectuated until notice had been published in the *Federal Register*:

> Section 2 of this Public Law requires that a Notice be published in the Federal Register describing the lands transferred to the respective communities: Has such publication taken [p]lace[?] *[W]hile the transfer of title was effectuated by the passage of the Act, the incorporation of the lands in question within the bounds of the respective reservation may not legally be completed until such time as the required publication has been effectuated.*

Id. at 1 (emphasis added).[9]

Respecting the effect of the savings clause, the Field Solicitor advised that existing assignments had to be honored:

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[9] A notice was published in the *Federal Register* on August 5, 1982. *See* 47 Fed.Reg. 34,050.

> [U]ntil such time as the interests described in the outstanding leases or assignments to the lands have expired or been terminated, the respective communities do not have a full proprietorial interest in those lands. When those lands are effectively incorporated within the jurisdiction or reservation of the respective communities by the aforementioned publication in the Federal Register, the communities will have full governmental or legislative jurisdiction over such land comparable to their jurisdiction over other lands of the reservation.

Id. at 2.

The Field Solicitor assumed that the 1980 law applied to the 1886 monies held by the Bureau of Indian Affairs for the benefit of the lineal descendants and that the 1886 monies could be turned over to the communities without notice to the 1886 beneficiaries:

> One further matter for consideration is the accumulated revenues currently held by the Bureau identifiable to the lands in question. It is my understanding that the apportioned share belonging to or identified for the Shakoppee [*sic*] Community has already been turned over to that group. Similar action should be taken as to the other two communities claiming an interest in these monies. As to how the respective communities can utilize these funds, it is interesting to note, as pointed out in the Secretary's letter to OMB that the cost of acquiring the

> land in question was offset against the recovery by the Mdewakanton and Wahpakoot [*sic*] Bands of Souix [*sic*] Indians against the United States (57 Court of Claims 357 (1932)) [*sic*] the beneficiaries of which included many individuals other than those for whom such land was held by the United States. In light of this bit of information it may be that tribal use of these impounded funds may include other than those persons previously identified as eligible Mdewakantons for purposes of occupying the land in question.

Id.

Lastly, the Field Solicitor recommended that an inventory of the 1886 property be made in connection with transfer of the property to the communities:

> It would be my suggestion that in preparation for meeting with the various communities on this legislation that the Bureau inventory all of the outstanding interests as to the lands transferred and be prepared to discuss them with each of the communities. Revenues from these lands produced after the effective transfer of title will be available to the tribe for tribal use as are the revenues from other acquired lands belonging to the Community.

Id. The materials made available to the court do not show that any such inventory was made.

To implement the 1980 Act, title to the 1886 lands, monies, and other property was transferred to the communities. Subsequent decisions by the Department of Interior have uniformly given effect to the ensuing transfer of title to the 1886 property, rejecting claims by lineal descendants of the loyal Mdewakanton. As Administrative Law Judge Amess stated in *Brewer v. Acting Deputy Assistant Sec'y for Indian Affairs,* 10 IBIA 110, at *16 (1982), prior to the Act, the United States held title for the benefit of the loyal Mdewakanton and their descendants, but "[w]ith passage of the Act of Dec. 19, 1980, title was held in trust for the community to be managed by it for the benefit of the community and its members." *See also Gitchel v. Minneapolis Area Dir.,* 28 IBIA 46, 48 (1995) ("there is simply no question as to the intent of Congress in 1980 to convey the beneficial title to these lands to the Community"); *cf. Cermak v. Norton,* 322 F.Supp.2d 1009, 1015 (D.Minn.2004) (holding that the Acting Area Director's decision not to reissue land certificates to heirs was not arbitrary and capricious).

Since 1980, the laws and regulations concerning Indian gambling have changed, making operation of gaming venues on community land feasible and lucrative. Operation of casinos, hotels, entertainment centers, and other developments, rather than agriculture, has generated very high income for one of the communities. Am. Compl. ¶ 33. Subsequently, the Shakopee Mdewakanton Sioux (Dakota) Community reportedly has purchased "thousands of acres of

suburban land" in the Minneapolis-St. Paul metropolitan area. Hr'g Tr. at 90. The lineal descendants have been shut out from this largesse to the extent that they have not been members of the favored community.

This Lawsuit

The four originally named plaintiffs claimed to sue "on behalf of themselves and all other descendants of persons listed on the May 20, 1886 U.S. Mdewakanton census." Am. Compl. ¶ 2. The Complaint alleges that the properties purchased with funds appropriated by the 1888, 1889, and 1890 Acts constituted the corpus of a trust, with legal title in the United States, but with equitable title in the loyal Mdewakanton and their lineal descendants. They aver that the United States breached its fiduciary duty in 1980 and thereafter by transferring trust assets and permitting non-descendants to receive profits from the casinos and other property on the lands in question. *Id.* ¶¶ 35-41. Secondarily, the plaintiffs allege that a contract was created between the loyal Mdewakanton and the United States through which the Mdewakanton renounced their tribal affiliation in exchange for the appropriated trust property and that the government breached this contract. *Id.* ¶¶ 50-55.

After plaintiffs filed their amended complaint, the government responded with a motion to dismiss, which makes three principal arguments. First, the government argues that the court has no jurisdiction

to hear this case under the Tucker Act, 28 U.S.C. § 1491(a)(1), or Indian Tucker Act, 28 U.S.C. § 1505, because the government had no money-mandating fiduciary duty. As the government would have it, no trust existed prior to 1980, and, even if one did, the 1980 Act transferred equitable title in the 1886 lands to the communities from the lineal descendants. Def.'s Mot. to Dismiss at 12-13. The government also argues that the loyal Mdewakanton and their lineal descendants are not an "identifiable group of American Indians" under the Indian Tucker Act. *Id.* at 12. Second, it denies that the United States has a contractual duty to plaintiffs, and argues that the contract claim is insufficient in detail and should be dismissed under Rule 9(h)(3) of the Rules of the Court of Federal Claims ("RCFC"). *Id.* at 22. Third, it asserts that the six-year statute of limitations has expired because any breach of contract or fiduciary duty took place with the passage of the 1980 Act. *Id.* at 22-23.

The plaintiffs filed a cross-motion for partial summary judgment on three issues: whether the lineal descendants are the trust beneficiaries of the 1886 lands, whether the United States breached its duties as trustee, and whether the United States breached its contractual duties to plaintiffs. *See* Pls.' Cross-Mot. at 1.

Despite the class-action language in the complaint, plaintiffs have neither applied for class certification nor do they apparently intend to do so in the near future. Plaintiffs' counsel has stated that at

least four different groups of plaintiffs are involved even though all plaintiffs claim to be lineal descendants: (1) members of the Shakopee community, (2) members of the Prairie Island community, (3) members of the Lower Sioux community, and (4) lineal descendants who do not belong to any of the communities. Hr'g Tr. at 48-49. For the present, plaintiffs have opted to file a motion to amend their complaint to add plaintiffs rather than to seek class certification. The motion requests leave to amend their complaint to add both additional named and anonymous plaintiffs, and asks that the court enter a protective order establishing filing procedures to protect the confidentiality of the anonymous "John Doe" and "Jane Doe" plaintiffs. In support of the amendment, plaintiffs claim that those who are members of communities fear that their involvement will be seen as action adverse to the communities and that their membership in the communities will be terminated and those lineal descendants among them who are not members of communities fear that the communities will deny their membership applications if their involvement in this case is known. Hr'g Tr. at 88-89.

A hearing on the pending motions was held on June 24, 2004, and, at the court's specific request, supplemental briefs were filed thereafter by the parties on the applicability *vel non* of the "Indian Trust Accounting Statute" that was initially enacted in 1990 as part of the annual appropriations act for the Department of Interior and has been adopted each

year thereafter. *See, e.g., Shoshone Indian Tribe v. United States,* 364 F.3d 1339, 1344 & n. 2 (Fed.Cir.2004). The current version of the Indian Trust Accounting Statute, enacted as part of the Department of the Interior and Related Agencies Appropriations Act, Pub.L. No. 108-108, provides as follows:

> *[N]otwithstanding any other provision of law,* the statute of limitations *shall not commence to run* on any claim, including a claim in litigation pending on the date of the enactment of this Act, concerning *losses to or mismanagement of trust funds, until the affected tribe or individual Indian has been furnished with an accounting* of such funds from which the beneficiary can determine whether there has been a loss.

Pub.L. No. 108-108, 117 Stat. 1241, 1263 (Nov. 10, 2003) (emphasis added).[10] The parties' supplemental briefing was completed in August. Thereafter, each of the three communities and Mr. Cermak filed their

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[10] The Federal Circuit in *Shoshone* addressed an identical statutory provision enacted as part of the appropriations made for the Department of Interior for 2003. *See* 364 F.3d at 1344 (quoting from Pub.L. No. 108-7). The prior versions were also identical, except, as the Federal Circuit noted, the original version adopted in 1990 did not contain the clause "from which the beneficiary can determine whether there has been a loss," which clause was added in 1991, nor did it incorporate the clause "including any claim in litigation pending on the date of this Act," which clause was added in 1993. *See Shoshone,* 364 F.3d at 1344.

motions for leave to participate as *amicus curiae,* and those motions were briefed.

ANALYSIS

Standards for Decision

Plaintiffs bear the burden of establishing the court's subject matter jurisdiction over the claim. *See McNutt v. General Motors Acceptance Corp. of Ind.,* 298 U.S. 178, 189, 56 S.Ct. 780, 80 L.Ed. 1135 (1936); *Ware v. United States,* 57 Fed.Cl. 782, 784 (2003); *Bond v. United States,* 43 Fed.Cl. 346, 348 (1999). In determining whether it has jurisdiction over a case under RCFC 12(b)(1) or 12(b)(6), a federal court must accept as true the facts alleged in the complaint and draw all reasonable inferences in favor of the plaintiffs. *See Henke v. United States,* 60 F.3d 795, 797 (Fed.Cir.1995) (citing *Scheuer v. Rhodes,* 416 U.S. 232, 236-37, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974)). "Fact-finding is proper when considering a motion to dismiss where the jurisdictional facts in the complaint . . . are challenged." *Moyer v. United States,* 190 F.3d 1314, 1318 (Fed.Cir.1999) (citing *Reynolds v. Army and Air Force Exch. Serv.,* 846 F.2d 746, 747 (Fed.Cir.1988)).

Jurisdiction over a claim against the United States requires a waiver of sovereign immunity and the existence of a cause of action that falls within the scope of that waiver. *United States v. White Mountain Apache Tribe,* 537 U.S. 465, 472, 123 S.Ct. 1126, 155 L.Ed.2d 40 (2003). Such a waiver may not be inferred,

but must be "'unequivocally expressed.'" *United States v. Mitchell,* 445 U.S. 535, 538, 100 S.Ct. 1349, 63 L.Ed.2d 607 (1980) ("*Mitchell I*") (quoting *United States v. King,* 395 U.S. 1, 4, 89 S.Ct. 1501, 23 L.Ed.2d 52 (1969)). The Tucker Act and the Indian Tucker Act both constitute such waivers, but any invocation of jurisdiction under those Acts must be accompanied by a corresponding substantive claim that "can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained." *United States v. Mitchell,* 463 U.S. 206, 217, 103 S.Ct. 2961, 77 L.Ed.2d 580 (1983) ("*Mitchell II*") (quoting *United States v. Testan,* 424 U.S. 392, 400, 96 S.Ct. 948, 47 L.Ed.2d 114 (1976)).

In assessing a motion to dismiss for failure to state a claim upon which relief can be granted, the court's "'task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims.'" *Swierkiewicz v. Sorema,* 534 U.S. 506, 511, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002) (quoting *Scheuer,* 416 U.S. at 236, 94 S.Ct. 1683). A motion to dismiss under RCFC 12(b)(6) should not be granted unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson,* 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957).

Summary judgment is appropriate when evidentiary materials filed in a case reveal that "there is no genuine issue as to any material fact and that the

moving party is entitled to a judgment as a matter of law." RCFC 56(c). *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). The party moving for summary judgment bears the initial burden of demonstrating the absence of genuine issues of material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). If no rational trier of fact could find for the non-moving party, summary judgment is appropriate. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). The court should resolve any doubts in making this determination in favor of the non-moving party. *Id.* at 587-88, 106 S.Ct. 1348.

In addition, "[a]lthough evidence presented by a non-movant in relation to a summary judgment motion need not be admissible at trial, the [c]ourt may not grant summary judgment to a moving party based solely on evidence that arguably may not be addressed and admitted at trial." *Bannum, Inc. v. United States,* 59 Fed.Cl. 241, 244 (2003) (citing *Celotex Corp.*, 477 U.S. at 324, 106 S.Ct. 2548; *Conoco, Inc. v. Department of Energy,* 99 F.3d 387, 393-95 (Fed.Cir.1996)). "Since the burden is on the party moving for summary judgment to demonstrate that there is no genuine issue of material fact, the movant also must show that the content of his affidavits would be admissible at trial." 10B Charles Wright, *et al., Federal Practice and Procedure: Civil 3d* § 2738, at 342 (1988).

Amici Curiae

The Shakopee Mdewakanton Sioux Community, the Prairie Island Indian Community, and the Lower Sioux Community have each moved for leave to participate as *amicus curiae,* as has Raymond Cermak, Sr., an individual who claims to be a lineal descendant of loyal Mdewakanton and who previously received trust monies from the government but is not an enrolled member of any of the three communities. Unlike intervention under RCFC 24(a), there is no right to participate as an *amicus curiae;* the decision "is left entirely to the discretion of the court." *Fluor Corp. v. United States,* 35 Fed.Cl. 284, 285 (1996). *See also United States ex rel. Roby v. Boeing Co.,* 73 F.Supp.2d 897, 900 (S.D.Ohio 1999); *American Satellite Co. v. United States,* 22 Cl.Ct. 547, 549 (1991).[11] In exercising this discretion, courts have

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[11] Rule 24(a)(2) permits intervention of right "when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties." The Shakopee and Prairie Island Communities state that they opted not to intervene because "this Court does not possess jurisdiction to declare the Tribes as the equitable title holder and trust beneficiary of the lands at issue." Shakopee and Prairie Island Reply at 2-3.

In plaintiffs' opposition to Mr. Cermak's motion for leave to participate as *amicus curiae,* plaintiffs contend that "if Ray Cermak is truly concerned about matters in this case that may affect him, then he can move to intervene as a plaintiff – as long as he can prove he is a lineal descendant of a person on the May

(Continued on following page)

considered such factors as: whether the parties oppose the motion, the strength of information and argument presented by the potential *amicus curiae's* interests, the partisanship of the moving entity, the adequacy of the current representation, the timeliness of the motion, and, perhaps most importantly, the usefulness of information and argument presented by the potential *amicus curiae* to the court. *Fluor,* 35 Fed.Cl. at 285; *American Satellite,* 22 Cl.Ct. at 549.

Several of these factors weigh in favor of granting leave. The communities' interests are strong in this case. Unlike in *American Satellite,* where the moving entity was similarly situated to the plaintiff and anticipated filing its own suit, the communities have an interest in this court's interpretation of the 1980 Act because they treat the land and other property addressed by that Act as inhering in them as of right. Shakopee and Prairie Island Mot. at 1-2. *See American Satellite,* 22 Cl.Ct. at 548. In addition, the communities' briefs may well be useful to the court. When *amici* have "specialized knowledge which may be beneficial to the court in the resolution" of the case, granting a motion for leave is usually appropriate. *See Hage v. United States,* 35 Fed.Cl. 737, 742 (1996). Here, the communities have detailed

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20, 1886 Minnesota Mdewakanton census." Pls.' Opp. to Mot. of Raymond Cermak at 2 (footnote omitted). Nonetheless, Mr. Cermak has chosen not to seek to intervene at this stage of the proceeding.

experience with the more recent events constituting part of the complex history involved in this case, and Mr. Cermak claims detailed experience with the pre-1980 regime under which the Department of Interior administered the 1886 lands and monies. Both the communities' perspectives and that of Mr. Cermak may assist the court in gathering a more fully balanced set of views on the disputed issues.

Some of the factors mitigate against granting leave to file. The communities are partisan in this case. Unlike appellate courts, trial courts "have frowned on participation which simply allows the amicus to litigate its own views." *American Satellite,* 22 Cl.Ct. at 549. The Shakopee and Prairie Island Communities also readily admit their support of the position of the United States, albeit from a quite different perspective. Shakopee and Prairie Island Reply at 2. The government has adequately represented the communities' interests and presumably will continue to do so. Trial courts are more likely to grant leave when they are "concerned that one of the parties is not interested in or capable of fully presenting one side of the argument." *Fluor,* 35 Fed.Cl. at 286 (quoting *American Satellite,* 22 Cl.Ct. at 549). The communities disagree with the United States' litigation strategy, but that concern may not be of importance in the resolution of the case. Shakopee and Prairie Island Reply at 4-5; *American Satellite,* 22 Cl.Ct. at 549. Again, by contrast, Mr. Cermak's posture more nearly fits with that of the plaintiffs

although his approach hardly matches the plaintiffs' arguments.

Timeliness also is a concern, but appears not to be an insurmountable obstacle to participation. The motions for leave were filed by the communities on August 31, 2004, after all briefing had been completed on the pending motion and cross-motion, including the supplemental briefing that occurred following the hearing on those motions. Mr. Cermak's motion was not filed until October 5, 2004. Nonetheless, the ensuing delay has amounted to no more than several months.

Several factors are neutral, or nearly so. Plaintiffs oppose the filing of *amicus curiae* briefs, while the government has not filed a brief on the subject. Plaintiffs aver that the "United States has expressed indifference" to the communities' motions, Pls.' Resp. to Mot. for Leave at 4, while the communities assert that the government "welcomes the Tribes as *amicus curiae*." Shakopee and Prairie Island Reply at 1.

On balance, the court will grant the communities' motions for leave, along with Mr. Cermak's motion. The communities' and Mr. Cermak's perspectives may be potentially useful. This consideration outweighs the opposition by plaintiffs and the communities' partisanship in approaching the issues. The Lower Sioux Community's motion for leave to file a memorandum as *amicus curiae* is granted. The Shakopee Mdewakanton Sioux Community, the Prairie Island Indian Community, and Mr. Cermak each moved to

participate as *amicus curiae* without specifying the scope of their request. Their motions are granted, limited to the filing of briefs. For the communities and Mr. Cermak to participate in any manner extending beyond the filing of the proffered briefs, they must file motions explaining the specific benefits to the court of their proposed additional contribution to the proceedings in this case.

Standing

In their *amicus* brief, the Prairie Island and Shakopee Communities challenge the plaintiffs' standing to present their claims. *See* Shakopee and Prairie Island *Amici* Br. at 5-7. For plaintiffs to have standing under the Constitution, they must satisfy three requirements. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992); *Allen v. Wright,* 468 U.S. 737, 751, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984). First, plaintiffs must suffer "injury in fact" – an invasion of a legally protected interest which is concrete and particularized, as well as actual or imminent. *Lujan,* 504 U.S. at 560, 112 S.Ct. 2130. Second, the injury must be "'fairly . . . traceable to the challenged action of the defendant.'" *Id.* at 560-61, 112 S.Ct. 2130 (quoting *Simon v. Eastern Ky. Welfare Rights Org.,* 426 U.S. 26, 41-42, 96 S.Ct. 1917, 48 L.Ed.2d 450 (1976)). Third, a favorable decision for the plaintiff must be likely to redress the injury. *Id.* at 561, 112 S.Ct. 2130. Plaintiffs' case satisfies each of these elements. The plaintiffs allege that they have suffered a concrete

and actual injury in fact – financial harm. Am. Compl. ¶¶ 42, 56. Moreover, this financial harm was allegedly caused by the defendant's breach of its fiduciary and contractual duties, and awarding the plaintiffs damages is likely to redress that harm by restoring their financial position, at least in part. *Id.*

Amici make three principal arguments, each of which fails to undermine plaintiffs' claim to standing. First, they argue that because plaintiffs are asserting group rights, they must represent the entire group. Because the plaintiffs have advised that, for the present, they will not seek class certification, *amici* assert that they do not represent the entire group of lineal descendants. Shakopee and Prairie Island Br. at 6. *Amici* rely on *Cherokee Nation v. United States,* 92 Ct.Cl. 262, 1940 WL 4122 (1940), in which the court dismissed a claim because the entire Cherokee tribe did not participate. However, the statute granting jurisdiction to this court's predecessor in *Cherokee Nation* explicitly required that the entire tribe bring suit. The court held that "the legislation authorizing an action to be brought by the tribe by its express terms permits only a suit by the tribe for the recovery of a judgment, if it is entitled to one, for the benefit of the whole tribe and not for certain individuals as members of the tribe." *Id.* at 268. "In other words, the jurisdictional act authorizes only the making and the adjudication of tribal claims." *Id.* at 268-69. In contrast, the loyal Mdewakanton, to qualify as beneficiaries of the 1888, 1889, and 1890 Acts, expressly had to abjure their relationship to *any* tribe; they

were obligated to sever their tribal relations. *See, e.g.*, Act of June 29, 1888; 25 Stat. 217, 228 (providing support for those full-blooded Mdewakanton who have resided in Minnesota since May 20, 1886 "and [have] severed their tribal relations"); Pls.' Ex. 30, at 1 (stating in a Letter from Mariana Shulstad for the Field Solicitor to Edwin Demery, Area Director, Bureau of Indian Affairs (Nov. 8, 1978), that the 1886 lands were purchased for the "benefit of those Mdewakanton Sioux individuals who had severed relations with their tribe"). Also, in this case jurisdiction is not grounded in a limited waiver by Congress, unlike in *Cherokee Nation* or in the *Sisseton* and *Medawakanton* annuity cases. Instead, jurisdiction is premised upon the more general waivers of sovereign immunity found in the Tucker Act, 28 U.S.C. § 1491, and the Indian Tucker Act, 28 U.S.C. § 1505.

Second, *amici* challenge the "injury in fact" suffered by those lineal descendants who also belong to one of the communities. According to this argument, these plaintiffs "are already eligible to share in the lands under the inherent and [c]onstitutional authority exercised by each [t]ribal government." Shakopee and Prairie Island Br. at 6. This eligibility supposedly bars such plaintiffs from suffering any injury. However, this argument improperly belittles plaintiffs' claims: the benefits some plaintiffs receive as members of one of the communities may be substantially less than, or different from, those which they would receive as a lineal descendant. *See, e.g.*, Pls.' Resp. to Mot. for Leave at 21. Although the court

has not made any factual findings regarding the veracity of *amici's* contention, plaintiffs' allegations of financial and other harm are sufficient to provide standing. *See Lujan,* 504 U.S. at 561, 112 S.Ct. 2130 (quoting *Lujan v. National Wildlife Fed'n,* 497 U.S. 871, 889, 110 S.Ct. 3177, 111 L.Ed.2d 695 (1990) ("on a motion to dismiss we 'presum[e] that general allegations embrace those specific facts that are necessary to support the claim.'")).

Third, the *amici* claim that the plaintiffs who belong to the communities have no redressable claim because they have not severed tribal relations and because the communities do not permit dual enrollment. Shakopee and Prairie Island Br. at 6-7. This argument is sophistic and pulls historical circumstances out of context. To be a beneficiary of the 1888, 1889, and 1890 Acts, a Mdewakanton must have severed tribal relations. *See, e.g.,* Act of June 29, 1888, 25 Stat. at 228; Pls.' Ex. 30, at 1. This requirement applied to the original trust beneficiaries. It reaches through time to the present day only for limited purposes, *viz.,* it was the principle governing eligibility for inclusion in the 1886 census, and it now defines the group of individual persons eligible to bring a claim. Moreover, the communities' prohibitions on dual enrollment do not affect the lineal descendants because their alleged status as a beneficiary of a trust does not constitute a separate enrollment.

In short, each of the arguments of *amici* directed against plaintiffs' standing to bring their claims lacks

merit and is unavailing. Plaintiffs have standing to pursue their claims.

Jurisdiction

A. Statutory Predicates for Suit

The government challenges the court's jurisdiction, arguing that the plaintiffs' claims fall outside the jurisdictional grants of the Tucker Act, 28 U.S.C. § 1491, and the Indian Tucker Act, 28 U.S.C. § 1505. As explained above, the United States must waive sovereign immunity to be bound by damage judgments, and such waiver must be explicit. *See supra*, at 535. Both Acts apply and provide the requisite waiver of sovereign immunity. The Tucker Act grants this court jurisdiction over claims "against the United States founded . . . [on] any Act of Congress or any regulation of an executive department . . . or for liquidated or unliquidated damages in cases not sounding in tort." 28 U.S.C. § 1491(a)(1). Plaintiffs' first claim is founded on an action for damages not sounding in tort, namely, breach of fiduciary duty, and their second claim alleges breach of a contract with the government.[12] The Tucker Act itself does not provide the substantive law to be applied; rather, trust and contract law supply that framework. *See*

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[12] The government also contends that the alleged breach of fiduciary duty is not a "money-mandating duty" under *Mitchell I*, *Mitchell II*, and *White Mountain Apache*. This contention is addressed below.

Confederated Tribes of Warm Springs Reservation of Oregon v. United States, 248 F.3d 1365, 1371 (Fed.Cir.2001). Because the Tucker Act "'itself provides the necessary consent' to suit . . . the rights-creating statute or regulation need not contain 'a second waiver of sovereign immunity.'" *United States v. Navajo Nation,* 537 U.S. 488, 503, 123 S.Ct. 1079, 155 L.Ed.2d 60 (2003) (quoting *Mitchell II,* 463 U.S. at 218-19, 103 S.Ct. 2961).

The Indian Tucker Act also provides a basis for this court's jurisdiction over the claims in this case. 28 U.S.C. § 1505 grants jurisdiction over "any claim" brought by

> *any* tribe, band, or other *identifiable group of American Indians* residing within the territorial limits of the United States or Alaska *whenever such claim is one arising under the Constitution, laws or treaties of the United States,* or Executive orders of the President, or is one which otherwise would be cognizable in the Court of Federal Claims if the claimant were not an Indian tribe, band, or group.

(Emphasis added.)

The government asserts that the lineal descendants of the loyal Mdewakanton do not have a right to sue under the Indian Tucker Act because they "are individual Indians and not a tribal group." Def.'s Mot. to Dismiss at 12. Congress was able to identify the loyal Mdewakanton and their lineal descendants in the Acts of 1888, 1889, 1890, and 1901. Moreover,

plaintiffs need not be an organized unit to claim jurisdiction under the Indian Tucker Act. *See Tee-Hit-Ton Indians v. United States,* 128 Ct.Cl. 82, 120 F.Supp. 202, 204 (1954) (holding that the descendants of the earliest known native inhabitants of an area of land in southeastern Alaska satisfied the "identifiable group" requirement). In addition, the alleged divestiture of rights occurring after the 1980 Act does not elide any jurisdiction that would arise under the Indian Tucker Act. *See Menominee Tribe v. United States,* 179 Ct.Cl. 496, 388 F.2d 998, 1001 (1967) (holding that despite the Menominee Termination Act, which terminated federal supervision over the tribe's property, the Menominee Tribe still could invoke jurisdiction under the Indian Tucker Act, in part because "[t]he tribe continues to hold the beneficial and equitable interest in the property").

Correlatively, the government argues that individual Indians are not permitted to bring *personal* claims under 28 U.S.C. § 1505. *See Fields v. United States,* 191 Ct.Cl. 191, 423 F.2d 380, 383 (1970) (holding that the alleged heirs of an individual plaintiff could not invoke jurisdiction under the Indian Tucker Act, but could bring claims under the Tucker Act); *Cherokee Freedmen v. United States,* 161 Ct.Cl. 787, 1963 WL 8556 (1963) (holding, on an appeal from the Indian Claims Commission, that claims by Cherokee Freedmen that the Dawes Commission should have enrolled them as members of the Cherokee Nation were correctly dismissed as individual and not group claims). This challenge also

fails, however, because plaintiffs bring their claims specifically and solely as members of a group. Unlike in *Cherokee Freedmen*, where the plaintiffs' case consisted of "individual claims dependent upon the individual facts and circumstances pertinent to the particular person asserting that he (or his ancestor) was wrongfully denied enrollment," 161 Ct.Cl. at 789, this case involves questions of a particular and discrete group's rights under various Acts of Congress. Whereas in *Cherokee Freedmen* "[t]here [was] no common right or group interest," *id.*, the lineal descendants of the loyal Mdewakanton have a collective interest in ascertaining whether the government had a fiduciary duty to them and whether that fiduciary duty has been violated or abridged. The lineal descendants are unable to sue as a tribe because they necessarily had to sever their tribal relations prior to 1886 to qualify as beneficiaries of the 1888, 1889, and 1890 Acts, but they were and still remain an identifiable group of American Indians.

Moreover, the fact that this case is not currently certified as a class action does not change the court's adjudication of questions common to the entire group. The court must determine whether the group (comprised of numerous individuals) is the beneficiary of a trust, whether the group has contracted with the United States government, and what if any rights the group has under such trust or contract. Thus, in this case the scope of the inquiry into group rights far exceeds that in *Fields* and *Cherokee Freedmen*. It is much more analogous to the situation in *Tee-Hit-Ton*,

where the court concluded that "some, at least, of the land exploited by the Tee-[H]it-[T]on was claimed by the plaintiff clan as a whole, and that it is, therefore, an identifiable group of Indians within the meaning of the statute." 120 F.Supp. at 204. Because determinations comparable to those in *Tee-Hit-Ton* are necessarily implicated by the claims in this case, jurisdiction is appropriate under the Indian Tucker Act.

B. Nature of Plaintiffs' Claims

1. Breach of fiduciary duty.

The plaintiffs allege that the 1886 property constituted the principal of a trust, with legal title in the United States, but with equitable title in the loyal Mdewakanton and their lineal descendants. The government allegedly breached its fiduciary duty in 1980 and thereafter by transferring control of trust assets to the communities and permitting non-descendants to receive profits from casinos and other ventures on the lands in question. Am. Com pl. ¶¶ 35-41. The government challenges this claim in three principal ways. First, it argues that the 1886 lands were never held in trust for the loyal Mdewakanton, and that the United States always held both legal and equitable title to the land. Def.'s Mot. to Dismiss at 16-20. The Acts of 1888, 1889, and 1890, according to this argument, extended benefits to those who satisfied the requirements of the Acts, but not to their lineal descendants. *Id.* at 19. Second, the government

interprets the 1980 Act as extinguishing any fiduciary duty the government owed to the lineal descendants. *Id.* at 13-16. Third, it contends that any duty the government still owes to the lineal descendants is not a money-mandating duty, and therefore the court lacks jurisdiction. *Id.* at 12-22. Each of these arguments is examined in turn.

(a) *Existence of a trust.*

Contrary to the government's assertions, the arrangement between the loyal Mdewakanton and the government includes all of the features of a trust. "Where . . . the relevant sources of substantive law create '[a]ll of the necessary elements of a common-law trust,' there is no need to look elsewhere for the source of a trust relationship." *White Mountain Apache,* 537 U.S. at 476 n. 3, 123 S.Ct. 1126. The three traditional elements of a trust are a trustee, beneficiaries, and trust property, also known as the corpus. *See Restatement (Third) of Trusts* § 2 cmt. f. The trustee manages the corpus in the best interests of the beneficiaries in accordance with the guidelines for and purposes of the trust. *Id.* In this case, the United States created a trust in which it acted as trustee, the loyal Mdewakanton and their lineal descendants were, and arguably are, the beneficiaries, and the corpus includes property, improvements to property, and money.

The 1888, 1889, and 1890 Acts in combination have three key features that show the creation of a

trust. First, the 1888 Act calls upon the Secretary of Interior to expend the appropriated funds for the Mdewakanton "as in his judgment he may deem best." Act of 1888, 25 Stat. at 228-29. Similar provisions were included in the 1889 and 1890 Acts. *See* Act of 1889, 25 Stat. at 992-93 (calling for the money to be expended by the Secretary of Interior "as may be deemed best in the case of each of these Indians or family thereof"); Act of 1890, 26 Stat. at 349 ("as in his judgment he may think best"). This language functionally appoints the Secretary of Interior to serve as the trustee to spend the funds on behalf of the beneficiaries, the loyal Mdewakanton. Second, the Acts of 1889 and 1890 call for "each of the Indians in this paragraph [to receive] as nearly as practicable, an equal amount in value of this appropriation and that made by [the 1888 Act]." *See* Act of 1889, 25 Stat. at 992-93. This provision operates as a guideline for the trustee: he or she must ensure that the corpus is distributed equally to the extent possible. Third, in order to ensure that the proceeds from the 1889 and 1890 appropriations went to the beneficiaries, Congress inserted an additional clause providing that if the funds were not all spent during the fiscal year, they "shall, notwithstanding, be used and expended for the purposes for which the same amount was appropriated and for the benefit of the above-named Indians." Act of 1889, 25 Stat. at 992. This clause aids in defining the corpus of the trust by directing that all of the funds allocated be used for the benefit of the loyal Mdewakanton, even if basic necessities had already been provided for them.

An analysis of the history behind Congress's enacted laws also reveals the creation of a trust. During debate on the 1888 Act, Rep. MacDonald referred to the Mdewakanton as "beneficiaries" of the 1888 Act. 19 Cong. Rec. H2977 (daily ed. Apr. 14, 1888) (statement of Rep. MacDonald). "The actual purchase of land under these appropriations began in April, 1889." *History of the Santee* at 282. As the purchases progressed, Congress seems to have kept watch over the results because the 1890 Appropriations Act specified that $2,000 of the $8,000 that was appropriated was designated to be expended for the Prairie Island settlement. *Id.* In addition, the property buyer, Robert B. Henton, observed that several prior purchases that had been deeded directly to the loyal Mdewakanton, *see supra*, at 528 n. 7, had been sold or mortgaged. *History of the Santee* at 283. Accordingly, Mr. Henton considered that title to future purchases should be retained by the government, and that policy was followed thereafter. *Id.*

The 1901 Act by Congress further reflected Congress's understanding that the 1886 lands were held in trust for the Mdewakanton. In connection with passage of that Act, Senator Pettigrew commented that "[t]he land was purchased for their benefit, and the title is in them subject to a provision by which they can not convey it." 34 Cong. Rec. 2523 (1901). This statement reflects an explicit understanding that the loyal Mdewakanton had equitable title to the 1886 property as beneficiaries. The 1901 Act empowered the Secretary of the Interior to sell certain land

provided "the written consent of the adult Indians residing in Redwood County, Minnesota, shall first be given." Act of 1901, 31 Stat. at 805, 806. A basic precept of trust law is that partial termination of a trust requires the consent of all the beneficiaries. *See Restatement (Third) of Trusts* § 65(1) ("if all of the beneficiaries of an irrevocable trust consent, they can compel the termination or modification of the trust").

The Department of Interior's practice in addressing the 1886 lands and other property has also been consistent with the formation of a trust. The Land Certificates that assigned 1886 land to individuals expressly stated that the land "is to be *held in trust, by the Secretary of the Interior,* for the exclusive use and benefit of the said Indian." *See* Pls.' Ex. 35 (emphasis added). A March 1974 Memorandum from the Acting Associate Solicitor for Indian Affairs to the Commissioner of Indian Affairs concluded that "[t]he lands *are held in trust by the United States* with the Secretary possessing a special power of appointment among members of a definite class." Pls.' Ex. 29, at 5 (emphasis added). An additional letter written in 1978 for the Field Solicitor to the Minneapolis Area Director of the Bureau of Indian Affairs emphasized that "none of the three Community governments, organized under the Indian Reorganization Act and operating under constitutions and bylaws, has any right, title, or interest in these lands. *The land is held for the benefit of a specific class of people and their descendants.*" Pls.' Ex. 30, at 1-2 (emphasis added). These memoranda only scratch the surface of the

numerous documents that plaintiffs have provided to the court that reflect the Department of Interior's pre-1980 interpretation of the 1888, 1889, and 1890 Acts, namely, that the United States held the 1886 lands in trust for the loyal Mdewakanton and their lineal descendants. The court has not been provided with any evidence to the contrary. Thus, the court necessarily concludes that there is no genuine dispute of material fact that a trust was created and that the government held the 1886 lands, the 1886 monies, and the other 1886 property in trust.

The government challenges the plaintiffs' contention that the lineal descendants are beneficiaries of the trust, claiming that the land was purchased only for the Mdewakanton who satisfied the conditions of the 1888, 1889, and 1890 Acts, and that their descendants are not beneficiaries of any trust. Def.'s Mot. to Dismiss at 19. However, the language of the Acts themselves and the consistent, lengthy administration by the Department of Interior of the 1886 lands, monies, and other property support the plaintiffs' view that the lineal descendants are beneficiaries. The 1863 Act, which first attempted to provide for the loyal Mdewakanton, sought to provide land that would serve as "an inheritance to said Indians *and their heirs* forever." 12 Stat. at 654 (emphasis added). The 1888 Act was motivated in part by the fact that the 1863 Act was not successfully implemented. 19 Cong. Rec. H2976-77 (daily ed. Apr. 14, 1888) (statement of Rep. MacDonald). The 1889 and 1890 Acts also called upon the Secretary of

Interior to expend the money on behalf of the "Indians *or family thereof.*" Act of 1889, 25 Stat. at 992 (emphasis added). Because the 1886 lands used an assignment system instead of an allotment system, Congress used the word "family" rather than "heirs," which was used in the 1863 Act. However, in this context, the Indian Land Certificates that implemented the 1888, 1889, and 1890 Acts certified that an assignee "*and his heirs* are entitled to immediate possession of said land." Pls.' Ex. 35 (emphasis added).

The uniformly consistent practice of the Department of Interior over a ninety-year span reinforces the view that lineal descendants are beneficiaries. Upon the death of a landholder, the Department frequently passed the land along to the children. *See, e.g.*, Pls.' Ex. 34, at 22. The 1955 Minneapolis Area Office Indian Affairs Manual claimed that to be eligible for an assignment, an applicant must be "a member of the Mdewakanton Band of Sioux, must have been [a] resident of the State of Minnesota on May 20, 1886, in the actual process of moving to the State of Minnesota, *or the descendant of such resident.*" Pls.' Ex. 25, at 0041046 (emphasis added). Internal memoranda of the Department further support this view. A 1971 memorandum from the Acting Associate Solicitor to the Field Solicitor said that "only descendants of Mdewakanton who resided in Minnesota on May 20, 1886, are eligible for land assignments at Shakopee." Pls.' Ex. 20, at 1. A 1978 memorandum for the Field Solicitor to the

Minneapolis Area Director of the Bureau of Indian Affairs stressed that the 1886 lands are "held for the benefit of a specific class of people *and their descendants.*" Pls.' Ex. 30, at 2. The court has been provided with no evidence contravening these and other similar documentary materials reflecting long-standing practice. In short, the 1888, 1889, and 1890 Acts created a trust, and the beneficiaries are the loyal Mdewakanton and their lineal descendants.

(b) *The 1980 Act.*

The government repeatedly claims that the 1980 Act terminated any trust that existed for the Mdewakanton. *See, e.g.,* Def.'s Mot. to Dismiss at 13-16. This argument fails to acknowledge the actual language of the 1980 Act. When the United States terminated trusts in the past, Congress typically used far more explicit language than that of the 1980 Act. *See, e.g.,* 25 U.S.C. § 677 ("The purpose of this subchapter is to provide for . . . the termination of Federal supervision over the trust, and restricted property, of the mixed-blood members of said [Ute] tribe."); 25 U.S.C. § 564 ("The purpose of this subchapter is to provide for the termination of Federal supervision over the trust and restricted property of the Klamath Tribe of Indians."). In contrast, the 1980 Act stated that certain lands currently "held by the United States for the use or benefit of certain Mdewakanton Sioux Indians under the [1888, 1889, and 1890 Acts] are hereby declared to hereafter be held by the United States" in trust for the communities. 94 Stat. at 3262. The 1980 Act does

not state as its purpose that the trust for the Mdewakanton would be terminated. Furthermore, the government's interpretation is inconsistent with the 1901 Act, which required the consent of the loyal Mdewakanton before the sale of designated land. Such consent is generally required to terminate a trust, and was not received here. *See Restatement (Third) of Trusts* § 65(1). The government's theory also does not explain the existence of a savings clause. Section 3 of the 1980 Act states that nothing in the Act shall "alter, or require the alteration, of any rights under any contract, lease, or assignment entered into or issued prior to enactment of this Act." 94 Stat. at 3262. This language covered more than pre-1980 assignments to lineal descendants. By its terms it saved pre-1980 contracts, leases, and assignments to *non*-descendants, which assignments generated proceeds that were gathered by the Department of Interior and then split among lineal descendants. These omissions indicate that the 1980 Act did not terminate the trust.

In addition, as plaintiffs have pointed out, the language of the 1980 Act implies that the lineal descendants' equitable title was not transferred. The 1980 Act transfers "all right, title, and interest *of the United States*" in the 1886 lands to the United States in trust for the communities. 94 Stat. at 3262 (emphasis added). Because the trust was created by the 1888, 1889, and 1890 Acts for the loyal Mdewakanton, legal title was in the United States but equitable title was held by the loyal Mdewakanton

and their lineal descendants. When the 1980 Act transferred the United States' right, title, and interest in land, that interest appears *not* to have included the equitable title to the 1886 lands, because the 1980 statute stated that the United States was transferring only that interest it possessed before the Act. Furthermore, the sole object of the Act's transfer is the 1886 lands, "including any structures or other improvements of the United States on such lands." *Id.* Notably, this description does not include the monies that were, and are, part of the trust's corpus. This omission further indicates that the trust persists.

The Department of Interior interpreted the 1980 Act to shift the authority to determine the uses of the land from the Department of Interior to the three communities. Repeals by implication are not favored by this court, and when "'two statutes are capable of co-existence, it is the clear duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.'" *Liesegang v. Secretary of Veterans Affairs,* 312 F.3d 1368, 1374 (Fed.Cir.2002) (quoting *Horner v. Jeffrey,* 823 F.2d 1521, 1527-28 (Fed.Cir.1987)). Absent an explicitly expressed intention by Congress to terminate the trust, the court will endeavor to reconcile the trust created by the Acts of 1888, 1889, and 1890, as well as the consent requirement in the 1901 Act, with the 1980 Act. For the present, it is enough to conclude that the 1980 Act did not terminate the trust created respecting the 1886 property and that the United

States still retains its powers and obligations as trustee regarding 1886 property.[13]

(c) *Money-mandating duty.*

The government vigorously argues that the United States does not owe a "money-mandating" duty to the plaintiffs. Def.'s Mot. to Dismiss at 10-20. For this court to have jurisdiction over a case, the United States must waive its sovereign immunity; the Tucker Act constitutes such a waiver, but only if the plaintiffs' substantive right comes from another source of law. *See Mitchell II,* 463 U.S. at 216, 103 S.Ct. 2961.

The Supreme Court in *Mitchell II* held that the source of substantive law must "fairly be interpreted as mandating compensation by the Federal Government for the damages sustained." *Id.* at 218, 103 S.Ct. 2961. Twenty years later, the majority in *White*

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[13] It may be that the 1980 Act created a trust on a trust, but that possibility and others must be remitted to exploration in future proceedings. The 1980 Act is so poorly drafted that it is difficult to make sense of its provisions. In addition, here as in *United States v. Sioux Nation of Indians,* 448 U.S. 371, 100 S.Ct. 2716, 65 L.Ed.2d 844 (1980),

> [t]he principles that it "must [be] presume[d] that Congress acted in perfect good faith in the dealings with the Indians of which complaint is made, and that [it] exercised its best judgment in the premises," *Lone Wolf v. Hitchcock,* 187 U.S. 553, 568, 23 S.Ct. 216, 222, 47 L.Ed. 299, are inapplicable in this case.

Id. at 373, 100 S.Ct. 2716.

Mountain Apache stated that "[i]t is enough, then, that a statute creating a Tucker Act right be *reasonably amenable* to the reading that it mandates a right of recovery in damages. While the premise to a Tucker Act claim will not be 'lightly inferred' . . . a fair inference will do." 537 U.S. at 473, 123 S.Ct. 1126 (emphasis added). The Federal Circuit has interpreted *White Mountain Apache* to redefine the test from *Mitchell II:*

> The previous test of 'fairly interpreted as mandating compensation' is now stated as whether the statute in question is 'reasonably amenable to the reading that it mandates a right to recovery in damages'. . . . The new test clearly lowers the threshold for establishing that a statute or regulation is money-mandating, for it replaces a normal 'fairly interpreted' test with a less demanding test of 'reasonable amenability' based on 'fair inferences.'

Fisher v. United States, 364 F.3d 1372, 1377 (Fed.Cir.2004).[14] The government interprets *White*

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[14] A principal divergence between the majority and the dissent in *Fisher* is whether this lower threshold should satisfy both a jurisdictional challenge under RCFC 12(b)(1) and a challenge on the merits under 12(b)(6), or apply only to the jurisdictional inquiry. *Id.* at 1377-78. The majority deferred this question because it was unnecessary to a ruling in the *Fisher* case. *Id.* at 1378. The dissenting judge would have reached the question and decided that the less rigorous test should be applied to the merits as well as to the jurisdictional determination. *Id.* at 1387, 1389-90 (Dyk, J. dissenting).

Mountain Apache to require a two-step inquiry: first, the court decides whether the government owed a duty to the plaintiff, and second, it determines whether the substantive law can be fairly interpreted as mandating compensation where that duty is breached. Def.'s Reply at 15; *see also White Mountain Apache*, 537 U.S. at 479-80, 123 S.Ct. 1126 (Ginsburg, J., concurring). In the present case, the plaintiffs have established that the United States had a money-mandating duty to them.[15]

First, the United States owes a fiduciary duty to the plaintiffs. The previous discussion describes in detail the United States' creation of a trust along with accompanying fiduciary duties. *See supra*, at 540-43. The United States' obligations in this case are more demanding than those in *White Mountain Apache* and *Mitchell II*, in both of which enforceable fiduciary duties were found to exist. *Mitchell II* held that various congressional acts imposed a fiduciary duty on the government regarding timber sales, among other things citing a "1910 Act [that] empowered the Secretary to sell timber on unallotted lands and apply the proceeds of the sales for the benefit of the Indians." 463 U.S. at 220, 103 S.Ct. 2961. That Act is similar to the 1901 Act empowering the Secretary of Interior to sell lands on behalf of the loyal Mdewakanton, provided he acquired their consent.

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[15] This is so regardless of which of the *Fisher* variants of the *White Mountain Apache* standard is applied. *See supra*, n. 14.

Act of Feb. 25, 1901, 31 Stat. 805-06. The court in *Mitchell II* also took account of regulations promulgated by the Office of Indian Affairs, arguing that "a fiduciary relationship necessarily arises when the Government assumes such elaborate control over forests and property belonging to Indians." 463 U.S. at 220, 225, 103 S.Ct. 2961. Similarly, the Minneapolis Area Office for Indian Affairs issued regulations "to provide procedures for the issuing of certificates covering Minnesota Mdewakanton Sioux assignments." Pls.' Ex. 25, at 1. *White Mountain Apache* held that the United States had a money-mandating duty regarding approximately thirty buildings on the former Fort Apache Military Reservation that were held in trust by the United States for the White Mountain Apache Tribe but occupied by the United States. The Supreme Court determined that the government was invested "with discretionary authority to make direct use of portions of the trust corpus. The trust property is subject to the right of the Secretary of the Interior to use any part of the land and improvements for administrative or school purposes." *White Mountain Apache,* 537 U.S. at 475, 123 S.Ct. 1126 (internal quotations and citations omitted). Similarly, the Secretary of Interior had a reasonably well delineated discretion in his or her duties as trustee for the Mdewakanton.

By contrast, in *Navajo Nation,* decided by the Supreme Court on the same day as *White Mountain Apache,* the United States had a much lesser role in managing property. *Navajo Nation* held that the

Indian Mineral Leasing Act (IMLA) did not confer a fiduciary duty upon the United States, emphasizing that "[t]he Secretary is neither assigned a comprehensive managerial role nor, at the time relevant here, expressly invested with responsibility to secure 'the needs and best interests of the Indian owner and his heirs.'" 537 U.S. at 507-08, 123 S.Ct. 1079. In contrast, the 1889 and 1890 Acts called for the Secretary of Interior to allocate the trust corpus "as may be deemed best in the case of each of these Indians or family thereof." Act of 1889, 25 Stat. at 992; Act of 1890, 26 Stat. at 349.[16]

Second, once a duty has been shown, the next question is whether the source of law may "fairly be interpreted as mandating compensation by the Federal Government for the damages sustained."

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[16] Similarly, *Mitchell I* held that the General Allotment Act of 1887 did not impose a fiduciary responsibility on the United States, relying on two key facts: the Indian allottee, rather than the United States, was "responsible for using the land for agricultural or grazing purposes," and the legislative history suggested that no fiduciary duty was meant to be created. 445 U.S. at 542-43, 100 S.Ct. 1349. In the case of the 1886 lands, unlike in *Mitchell I*, the United States assigned the lands as opposed to allotting them; it also was responsible for leasing the lands to others, collecting rents, and dividing the proceeds among the beneficiaries. In *Mitchell I*, respecting the statute at issue, Senator Dawes had explained "that the statute as amended would still ensure that title to the land would be transferred to the Indian allottee at the expiration of 25 years." *Id.* at 543, 100 S.Ct. 1349. No such provision enabled the Mdewakanton to acquire the land after a period of time – it was held in trust.

Mitchell II, 463 U.S. at 218, 103 S.Ct. 2961. Once it has been shown that the government owes a fiduciary duty as a trustee to a group of plaintiffs, mandatory compensation for a breach of that duty is ordinarily a logical and fair interpretation of the underlying statutory provisions. *See, e.g., id.* at 226, 103 S.Ct. 2961 ("Given the existence of a trust relationship, it naturally follows that the Government should be liable in damages for the breach of its fiduciary duties."). "[E]lementary trust law, after all, confirms the commonsense assumption that a fiduciary actually administering trust property may not allow it to fall into ruin on his watch." *White Mountain Apache,* 537 U.S. at 475, 123 S.Ct. 1126. In this case also, having found that a fiduciary relationship exists, a money-mandating duty follows as a matter of course. Here, there is additionally a direct statutory predicate for a money-mandating duty. The requirement in the 1889 and 1890 Appropriations Acts that if the funds were not all spent during the fiscal year, they must nonetheless be used to support the Mdewakanton, further indicates that if the proceeds of the trust corpus are not used for the benefit of the Mdewakanton, compensation is appropriate. *See, e.g.,* Act of 1889, 25 Stat. at 992.

Moreover, as the undisputed record shows, this is not a case in which the lineal descendants of the loyal Mdewakanton were provided a substitute for their beneficial interest. In other words, this is *not* a case in which the government sought to invoke "the traditional rule that a trustee may change the form of

trust assets as long as he fairly (or in good faith) attempts to provide his ward with property of equal value." *Sioux Nation,* 448 U.S. at 416, 100 S.Ct. 2716. In short, the United States has breached its fiduciary duties, and the applicable law mandates compensation. However, the record is insufficient to show the nature and extent of the breach of fiduciary duty, and it does not begin to address the posture of individual plaintiffs respecting the breach.

2. Breach of Contract

In addition to their claim of breach of fiduciary duty, the plaintiffs allege that the loyal Mdewakanton formed a contract with the United States in which they agreed to sever their tribal relations, express loyalty to the United States, and move onto the 1886 lands. In exchange, the United States would purchase the 1886 lands and place them in a trust for the Mdewakanton. Am. Com pl. ¶¶ 11-20. Beginning in 1885, John Bluestone allegedly negotiated this contract with Special Agent Walter McLeod. *Id.* ¶ 13; Pls.' Cross-Mot. at 13. The 1886 and 1889 censuses recorded which Mdewakanton were willing to enter the contract by severing their tribal relations. Pls.' Cross-Mot. at 15-16. As plaintiffs would have it, the 1889 and 1890 Acts reflected contract modifications requested by the Mdewakanton. *Id.* at 16-17. By distributing income, profits, and proceeds arising from the 1886 lands to individuals who are not lineal descendants, the United States has allegedly breached its contractual duty to the plaintiffs. Am.

Compl. ¶¶ 52-55. The lineal descendants, as intended beneficiaries of the contract, allegedly have a right to sue for this breach. Pls.' Cross-Mot. at 42.

The government denies the existence of a contract, claiming that "the [1888, 1889, and 1890] appropriations were gratuitous acts by the United States and not contractual obligations." Def.'s Mot. to Dismiss at 21. The government also argues that the plaintiffs fail to plead the contract in sufficient detail, as required by RCFC 9(h)(3) ("If the claim is founded upon a contract or treaty with the United States, [the complaint shall include] a description of the contract or treaty sufficient to identify it."). Def.'s Mot. to Dismiss at 22.

A contract with the government arises only if three requirements are satisfied: (1) mutual intent to contract, including an offer and acceptance; (2) consideration; and (3) a government representative who had actual authority to bind the government. *See La Van v. United States,* 382 F.3d 1340, 1346 (Fed.Cir.2004); *American Fed. Bank, F.S.B. v. United States,* 62 Fed.Cl. 185, 194 (2004). Plaintiffs claim to meet these elements through a contract implied in fact. Pls.' Cross-Mot. at 43. Contracts implied in fact are founded upon a meeting of the minds and inferred from the conduct of the parties. *Algonac Mfg. Co. v. United States,* 192 Ct.Cl. 649, 428 F.2d 1241, 1255 (1970); *American Fed.,* 62 Fed. Cl. at 194. According to the plaintiffs, mutual intent to contract is apparent from the behavior of the respective parties, with the United States' enactment of the 1888, 1889, and 1890

Appropriations Acts and purchasing the 1886 lands, and with the Mdewakanton moving to those lands and severing their tribal relations. Pls.' Cross-Mot. at 43-44. Consideration is allegedly present because the Mdewakanton severed their tribal relations and the United States provided them land. *Id.* at 44. The government representative who allegedly negotiated the contract was United States Special Agents Walter McLeod and, subsequently, Robert Henton, both of whom supposedly had actual authority under the Acts to bind the government. *Id.* at 44-45.

On the facts as pled by the plaintiffs, it is unnecessary to explore in any detail the questions whether a contract exists between the loyal Mdewakanton and the United States or whether the complaint sets out the allegations of contractual formation in sufficient detail because plaintiffs' claim of breach of contract is barred on statute of limitations grounds. *See infra.*

C. Statute of Limitations

The government further argues that the statute of limitations had expired prior to plaintiffs' filing of their complaint. Def.'s Mot. to Dismiss at 22-23. Generally, a plaintiff must file a suit against the government within six years after the claim first accrues. 28 U.S.C. § 2501. This statute of limitations is a jurisdictional limitation on the government's waiver of sovereign immunity and therefore must be construed strictly. *See, e.g., Hopland Band of Pomo Indians v. United States,* 855 F.2d 1573, 1576-77

(Fed.Cir.1988). However, the Indian Trust Accounting Statute quoted *supra,* at 535, must be taken into account in addressing the generally applicable six-year statute of limitations.

The Indian Trust Accounting Statute was analyzed in much detail and with great care in the Federal Circuit's recent decision in *Shoshone Indian Tribe,* 364 F.3d 1339. As *Shoshone* held, the opening phrase "[n]otwithstanding any other provision of law" combined with the statement that the "statute of limitations shall not commence to run on any claim . . . concerning losses to or mismanagement of trust funds" indicates that the specific provisions of the Indian Trust Accounting Statute trump those of 28 U.S.C. § 2501, the general statute of limitations. 364 F.3d at 1346. Second, Congress chose the phrase "shall not commence to run" as opposed to "tolls," meaning that the *beginning* of the limitations period is delayed until an accounting is provided. *Id.* at 1347. Indeed, in this regard, the Indian Trust Accounting Statute resurrects claims that may previously have been barred by the statute of limitations. This interpretation is consistent with principles of trust law, because "[b]eneficiaries of a trust are permitted to rely on the good faith and expertise of their trustees; because of this reliance, beneficiaries are under a lesser duty to discover malfeasance relating to their trust assets." *Id.*

In *Shoshone,* the Federal Circuit interpreted the Indian Trust Accounting Statute to be limited to mismanagement of trust funds and to losses

"resulting from the Government's failure or delay in (1) collecting payments under the sand and gravel contracts, (2) depositing the collected monies into the Tribes' interest-bearing trust accounts, or (3) assessing penalties for late payment." *Id.* at 1350. This limitation led the court of appeals to hold claims of asset mismanagement time-barred: "While it is true that a failure to obtain a maximum benefit from a mineral asset is an example of an action that will result in a loss to the trust, the Act's language does not on its face apply to claims involving trust *assets*." *Id.*

In its supplemental brief in this case, the government challenges *any* applicability of the Indian Trust Accounting Statute.[17] The government asserts that the plaintiffs' claims neither involve a trust nor do they involve trust funds. Def.'s Supp. Br. at 7-10. These claims are unavailing. First, as described previously, a set of closely related appropriation acts of Congress created a trust, and plaintiffs have put at issue the government's role as trustee. Second, as to whether "trust funds" are at issue here, the government completely ignores that the Department of Interior maintained for years 1886 monies in trust

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[17] The government's briefs filed with its motion to dismiss and in response to plaintiffs' cross-motion omitted any mention whatsoever of the Indian Trust Accounting Statute. It was not until the court requested supplemental briefing of the Indian Trust Accounting Statute at the hearing on the cross-motions that the government addressed the Statute and issues arising with its application to this case.

accounts and paid distributions to lineal descendants of loyal Mdewakanton from those accounts. *See supra*, at 533 (quoting the Field Solicitor's letter dated February 6, 1981 to the Area Director, regarding, among other things, disposition of the 1886 monies after enactment of the 1980 Act). Moreover, the Department of Interior has adopted guidelines applicable to the administration by the Bureau of Indian Affairs of "Trust Funds For Tribes and Individual Indians." *See* 25 C.F.R. Chapter I, Part 115. Those guidelines define "[t]rust funds" as "money derived from the sale or use of trust lands, restricted fee lands, or trust resources and any other money that the Secretary must accept into trust." 25 C.F.R. § 115.002. The monies held by the Department before 1980 for lineal descendants of the loyal Mdewakanton certainly fall within that definition. In addition, plaintiffs allege instances where proceeds from activities on the 1886 lands have not been distributed in accord with the terms of the trust, including proceeds from a gravel quarry, a cigarette enterprise, a bingo casino, and the current casinos. Pls.' Supp. Br. at 6-9. These claims respecting proceeds differ from the asset-mismanagement claims at issue in *Shoshone*, which involved contentions that the United States could have secured a better price under certain leases. Trust funds are the focus of the present case. The Mdewakanton claims deal with distribution of proceeds from leasing, not the leasing itself.[18]

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[18] The government argues that the lineal descendants are

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The government also challenges the applicability of the Indian Trust Accounting Statute because the government so openly disavowed any obligations as trustee after 1980. As the government would have it, this blatant repudiation necessarily triggered the statute of limitations such that it now has expired. Def.'s Supp. Br. at 6. The government relies on the Federal Circuit's commentary in *Shoshone* that "[a] trustee may repudiate the trust by express words or by taking actions inconsistent with his responsibilities as trustee." 364 F.3d at 1348. However, this argument by the government ignores a crucial caveat by the court of appeals that followed the clause the government quotes: "[I]t is often the case, however, that the trustee can breach his fiduciary responsibilities of managing trust property without placing the beneficiary on notice that a breach has occurred. It is therefore common for the statute of limitations to not commence to run against the beneficiaries until a final accounting has occurred that establishes the deficit of the trust." *Id.* In addition, as *Shoshone* recognizes, the Indian Trust Accounting Statute constitutes a specific exception to the traditional rules regarding applicability of statutes of limitations to claims of breach of trust. *Id.* at 1348-51. The Indian Trust Accounting Statute categorically applies

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ineligible to receive proceeds from the casinos under the 1988 Indian Gaming Regulatory Act, 25 U.S.C. § 2710. Def.'s Supp. Br. at 9 n.4. At this point, the court need not rule on this issue because the breach of fiduciary duty involves more than the failure to gather and distribute proceeds from the casinos.

"[n]otwithstanding any other provision of law." Thus, the Indian Trust Accounting Statute resuscitates and preserves plaintiffs' claims of breach of trust, displacing 28 U.S.C. § 2501 in the process.

The Indian Trust Accounting Statute does not apply to plaintiffs' contract claim. Because a congressional waiver of a statute of limitations must be strictly construed, *Shoshone* held that the Indian Trust Accounting Statute only applied to trust mismanagement and to specific kinds of losses. *Id.* at 1351. Plaintiffs' breach of contract claims do not fall within either category. Contrary to the plaintiffs' claims, the claims for breach of contract began to accrue in 1981 when the United States transferred the trust corpus to the communities. Lower Sioux *Amicus* Br.App. 4, at 2. The Indian Trust Accounting Statute, because of its explicit scope, cannot save the plaintiffs' contract claim, which expired in 1987.

Plaintiffs raise five additional arguments in an attempt to salvage their contract claim. *See* Pls.' Cross-Mot. at 46-49. First, they argue that the breach of contract has taken place within the last six years. This argument fails because claims begin to accrue when all of the actions necessary to formulate the claim have taken place and the claimant knows or should have known of the claims' existence. *See Kinsey v. United States,* 852 F.2d 556, 557 n.* (Fed.Cir.1988). The United States' refusal to assign lands or send trust proceeds to lineal descendants who did not belong to the communities should have made plaintiffs aware of the alleged breach of

contract. Second, and relatedly, they invoke the continuing-claim doctrine. The continuing-claim doctrine "operates to save parties who have pled a series of distinct events – each of which gives rise to a separate cause of action – as a single continuing event." *Ariadne Fin. Servs. v. United States,* 133 F.3d 874, 879 (Fed.Cir.1998). The documentary materials before the court include a letter from the Field Solicitor stating that the 1886 monies would be transferred to the communities in light of the 1980 Act: "It is my understanding that the apportioned share belonging to or identified for the Shakoppee [*sic*] Community has already been turned over to that group. Similar action should be taken as to the other two communities claiming an interest in these monies." Lower Sioux *Amicus* Br.App. 4, at 2 (Letter from Elmer T. Nitzschke to Edwin Demery (Feb. 6, 1981) (quoted more fully *supra,* at 533)). This distribution to the communities appears to have taken place in 1981. Since then, the alleged default consists of a failure to gather and segregate 1886 monies and to hold them for the lineal descendants.

Third, the plaintiffs claim they did not have adequate notice because the United States insisted that the lineal descendants did not have title. These very statements, however, should have given them notice that the United States was repudiating its alleged contractual duties. Fourth, they request that the court apply equitable tolling to save their contractual claim. Equitable tolling is applied "sparingly" and usually when "the claimant has actively pursued

his judicial remedies by filing a defective pleading during the statutory period, or where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass." *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 96, 111 S.Ct. 453, 112 L.Ed.2d 435 (1990). No evidence of such misconduct has been provided. Fifth, plaintiffs claim that Count III, which repeats the claims of breach of contract on behalf of minors, was tolled until three years after the minors reached majority age. This argument fails because, as described above, any alleged breach of contract took place in 1981 at the latest. Eighteen years is the age of majority in Minnesota. *See* Minn.Stat. § 645.451. The applicable statute of limitations, 28 U.S.C. § 2501, treats children as if they were legally unable to file suit and allows filing within three years after a child reaches majority status. The latest date anyone who had a claim at the time of breach could have turned eighteen is 1999, assuming the breach took place in 1981, and the additional three years gave such a young adult until 2002 to file. This claim was filed in 2003, so the minors' contract claims are time-barred as well.

For the foregoing reasons, plaintiffs' claims of breach of contract are dismissed.

D. The Menominee Tribe Exception

As a final jurisdictional issue, the court raises *sua sponte* the question of whether plaintiffs' suit is

barred by *Menominee Tribe v. United States*, 221 Ct.Cl. 506, 607 F.2d 1335 (1979). In *Menominee Tribe*, the Court of Claims was concerned with a statute terminating a trust for the benefit of the Menominee Tribe. In that context, the court held that it lacked jurisdiction over claims of breach of fiduciary duty when the alleged breach consisted of an act of Congress within Congress's constitutional powers. *Id.* at 1344 ("[W]hen the valid acts of Congress itself are assailed as unjust, unfair, in bad faith, or blind to the Indians' interest – in a case not raising a constitutional claim – we do not believe that Congress intended in sections 1491 or 1505 to repose that unusual authority . . . in this court."). In *Menominee Tribe*, the Court of Claims conceded that a federal agency or official could render the United States liable for breach of fiduciary duty, but it rejected the proposition that an act of Congress could do so, or at least that Congress would not have intended to waive the government's sovereign immunity against suit in such circumstances. *Id.* at 1340. The present case is distinguishable from *Menominee Tribe* because here it was the *Department of Interior* that allegedly breached its duty to the lineal descendants, not Congress. As discussed previously, the 1980 Act did not by its terms terminate the trust for the benefit of the lineal descendants of the loyal Mdewakanton. Although the 1980 Act is hardly a model of good legislative drafting, it only conveyed to the communities that title which the United States previously possessed, and the United States had only a bare legal title as trustee because the equitable title

belonged to the lineal descendants. Moreover, because the 1980 Act concerned only title to land, it did not address the 1886 monies in any respect. Consequently, the Department of Interior's distribution of trust funds consisting of monies derived from the 1886 lands allegedly violated its obligations under the trust created by the 1888, 1889, and 1890 Acts of Congress.

Menominee Tribe also abjured any jurisdiction over executive actions implementing congressional acts that would be deemed a breach of fiduciary duty. *Menominee Tribe*, 607 F.2d at 1345 ("Unless the Department violated the Constitution or some outstanding directive of Congress, the United States cannot be held liable for Interior's affirmative actions or passive omissions with respect to the passage and implementation of the Termination Act."). In the present case, the Department violated the directives of Congress to serve as a trustee for the lineal descendants. The Department of Interior may have been relying on a misinterpretation of the 1980 Act when it transferred 1886 monies to the communities and thereafter failed to gather, hold, and distribute proceeds from the beneficial use of the 1886 lands, but this reliance does not change its breach of the duties imposed on it by earlier acts of Congress.

In short, the *Menominee Tribe* exception does not operate to divest this court of jurisdiction it otherwise would have under the Tucker Act and the Indian Tucker Act to consider plaintiffs' claims of breach of trust. Even if *Menominee Tribe* remains good law, the

alleged breach in this case does not stem from a constitutional act of Congress that terminated a trust.

Moreover, the court is well aware that *Menominee Tribe* may well have been overruled by the Supreme Court's decisions in *Mitchell II* in 1983 and *White Mountain Apache* in 2003. In *Menominee Tribe,* the Court of Claims was reluctant to find that the United States had waived its sovereign immunity over a claim of breach of a fiduciary duty that stemmed from a statute terminating a trust for the benefit of Indians. *See, e.g.,* 607 F.2d at 1342 ("[I]t has also been established for at least seventy years that Congress has the unilateral and plenary power . . . to abrogate or modify, by statute, a prior treaty with Indians."). Even though the Court of Claims in *Menominee Tribe* conceded that the texts of both the Tucker Act and Indian Tucker Act would have permitted suit, the "historical treatment of consents to Indians to sue the sovereign in this court" justified a limiting interpretation of these Acts. *Id.* Notably, *Mitchell II* was decided by the Supreme Court only three years after *Menominee Tribe,* and *Mitchell II* discerned no impediment in either the Tucker Act or the Indian Tucker Act to this court's jurisdiction to consider claims of breach of fiduciary duty, however such claims might arise.

In *Mitchell II,* the Supreme Court concluded that the Tucker Act and the Indian Tucker Act constituted the government's waiver of sovereign immunity and that no further, or second, waiver of sovereign

immunity was needed for this court to have jurisdiction over a claim of breach of fiduciary duty. Further, what was needed was a source of substantive law that could be "fairly . . . interpreted as mandating compensation by the Federal Government for the damages sustained," creating a money-mandating duty. 463 U.S. at 218, 103 S.Ct. 2961. *White Mountain Apache* reaffirmed this interpretation of the Tucker Act and the Indian Tucker Act, and arguably eased somewhat the showing required to establish a money-mandating duty. *See supra,* at 544. In short, *Mitchell II* and *White Mountain Apache* negated the premise of *Menominee Tribe* by concluding that there was no basis for a constrained interpretation of the statutory waiver of sovereign immunity in the Tucker Act and Indian Tucker Act, at least in Indian trust cases.[19] Finally, even if *Mitchell II* and *White Mountain Apache* left any doubt that the

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[19] After *Mitchell II, Navajo Nation*, and *White Mountain Apache*, a commentator concluded that the focus was no longer on sovereign immunity in Indian trust cases but rather on a substantive money-mandating source of law:

> [W]hile a party still must find a substantive money-mandating source of law for a claim beyond the Tucker Act, the party need not find a separate waiver of sovereign immunity elsewhere; nor is the interpretation of that proposed source of substantive law subject to the strict construction rule that otherwise controls the threshold determination of whether the government has waived immunity.

Gregory C. Sisk, *Yesterday and Today: Of Indians, Breach of Trust, Money, and Sovereign Immunity*, 39 Tulsa L.Rev. 313, 335 (2003).

Menominee Tribe exception no longer was viable, the Indian Trust Accounting Statutes should dispel any such residuum. The Indian Trust Accounting Statutes reveal a congressional willingness to resuscitate, preserve, and enable suits against the government as trustee. The Court of Claims' 1979 decision in *Menominee Tribe* does not constitute a jurisdictional bar to this suit.

Partial Summary Judgment

Plaintiffs' cross-motion for partial summary judgment focuses on three issues: whether the lineal descendants are the trust beneficiaries of the 1886 lands, whether the United States has breached its fiduciary duties, and whether the government has breached its contractual duties. Pls.' Cross-Mot. at 1. This motion is granted in part and denied in part. As the preceding analysis shows, the plaintiffs are entitled to a partial summary judgment that a trust was created in connection with and as a consequence of the 1888, 1889, and 1890 Acts for the benefit of the loyal Mdewakanton and their lineal descendants, which trust included land, improvements to land, and monies as the corpus. This trust was not extinguished by the 1980 Act, and the statute of limitations does not bar plaintiffs' claim of breach of fiduciary duty because of the Indian Trust Accounting Statute.[20] The

[20] At this early stage of the case, plaintiffs rest on allegations that they are lineal descendants of the loyal Mdewakanton. Future proceedings will be held to determine whether

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undisputed record also shows that the government breached its fiduciary duties respecting the trust, and partial summary judgment is appropriate in this respect as well.

Plaintiffs' motion is otherwise denied. The record is incomplete as to the extent of the breach by the government of its fiduciary duties. No accounting has been rendered. No inventory of funds and lands constituting the corpus has been made, and plaintiffs who belong to a community may have received benefits. Because plaintiffs include members of each of the three communities as well as non-members, individual plaintiffs may differ insofar as they have suffered injury from the breach. Hr'g Tr. at 47-49. Entry of partial summary judgment in favor of plaintiffs thus does not extend beyond a conclusion that the government has as a general matter breached its fiduciary duties under the trust created for the loyal Mdewakanton and their lineal descendants. Lastly, because the contract claims are being dismissed on

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plaintiffs satisfy their burden of proof on this factual issue. The government argues that the plaintiffs have produced insufficient evidence to prove their standing at the summary judgment stage. *See* Def.'s Reply at 20 (citing *Lujan*, 504 U.S. at 561, 112 S.Ct. 2130 (holding that for a summary judgment, unlike for resisting a motion to dismiss, plaintiffs must set forth "specific facts" establishing the court's jurisdiction)). Here, the plaintiffs have produced undisputed evidence that supports standing to obtain a partial summary judgment with respect to their claims of breach of fiduciary duty.

statute of limitations grounds, summary judgment cannot be entered on those claims.

Accordingly, plaintiffs' cross-motion for partial summary judgment is granted in part and denied in part.

Amendment of the Complaint

Plaintiffs have moved for leave to file a Second Amended Complaint to add both additional named and anonymous plaintiffs. Plaintiffs have also moved for an order protecting the identities of the anonymous plaintiffs. By the proposed amendment, the total number of plaintiffs would be raised to more than 500. Pls.' Mot. for Leave to Amend Compl., Attach. A at I. The original complaint named 134 individual plaintiffs, and the First Amended Complaint increased the total number of named plaintiffs to 251. Plaintiffs' request for anonymity pertains to alleged lineal descendants who are currently members of a community and are concerned that their participation would be viewed as adverse to the communities and would risk termination of their membership or who are applying for membership to communities and are concerned they would be denied admission if the communities learn of their participation in this case. Hr'g Tr. at 88-89.

Plaintiffs' motion to amend their complaint raises procedural issues of joinder and public access to

judicial proceedings.[21] All of the prospective additional plaintiffs must satisfy the requirements of permissive joinder before they can join in this action. In addition, respecting the request of some plaintiffs for anonymity, the court must balance their need for anonymity against potential prejudice to the government and the public's interest in knowing their identity. For its part, the government represents that it does not oppose plaintiffs' request to add additional named plaintiffs, but it does object to plaintiffs' requests to add anonymous plaintiffs and for a protective order. Def.'s Resp. to Pls.' Mot. for Leave to Amend Compl. at 1.

A. Additional Plaintiffs

Adding additional individual plaintiffs who allegedly are lineal descendants of the loyal Mdewakanton raises the same issue of joinder as that which arises with the individuals who are currently named as plaintiffs. The pertinent rule, RCFC 20(a), provides that "[a]ll persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the

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[21] It also engenders concerns about potential class-certification proceedings and notice to potential additional parties. These additional questions are addressed in the closing portions of this opinion.

action." Individual plaintiffs must satisfy the requirements of this Rule.

First, all of the plaintiffs would be jointly asserting claims for breach of the same fiduciary duty. As specified in their complaint, the plaintiffs claim to sue as individuals "on behalf of themselves and all other descendants of persons listed on the May 20, 1886 U.S. Mdewakanton census." Am. Compl. ¶ 2. The court construes this language to mean that the named plaintiffs are asserting their claims jointly and severally, and as representatives of a potential class comprised of four subclasses. *See supra,* at 534. Thus, all of the prospective plaintiffs would be asserting a right to relief jointly and severally, and, in addition, their claims arise out of the same transaction or occurrence, *viz.*, the trust created by the appropriations statutes enacted in 1888, 1889, and 1890. In that regard, the plaintiffs' relationship satisfies the first element of Rule 20(a).

The plaintiffs' circumstances in this case are readily distinguishable from the misjoined plaintiffs addressed by the recent decision in *Franconia Associates v. United States,* 61 Fed.Cl. 335 (2004). In that case, a number of property owners sued the United States for breach of loan agreements, but each plaintiff had entered into a separate agreement. The plaintiffs in *Franconia* did not meet the first requirement of RCFC 20(a) because, although their claims shared common legal and factual issues, the claims did not arise out of the *same* transaction or occurrence. *Id.* at 337.

Second, in this case there are questions of law or fact that would be common to all of the plaintiffs. This requirement "is usually easily satisfied, particularly since there must be only one such overlapping question." *Id.* at 336. Here, all or most of the legal issues would be common to the plaintiffs, as would many of the factual issues.

In sum, permissive joinder of additional lineal descendants of the loyal Mdewakanton is proper under RCFC 20(a), and, accordingly, plaintiffs are granted leave to file a Second Amended Complaint to add such plaintiffs.

B. Anonymous Plaintiffs

RCFC 10(a) provides that the title in a complaint "shall include the names of all the parties." The use of pseudonyms in a complaint is contrary to this requirement. Consequently, courts allow parties to proceed anonymously only where unusual circumstances justify concealing a party's identity. *See Does I Thru XXIII v. Advanced Textile Corp.*, 214 F.3d 1058, 1067 (9th Cir.2000) (collecting cases). Five federal courts of appeals that have reviewed a trial court's denial of a party's request to proceed anonymously have instructed trial courts to balance the competing interests involved. *See id.* at 1068; *M.M. v. Zavaras*, 139 F.3d 798, 803-04 (10th Cir.1998); *James v. Jacobson*, 6 F.3d 233, 238 (4th Cir.1993); *Doe v. Frank*, 951 F.2d 320, 323-24 (11th Cir.1992); *Doe v. Stegall*, 653 F.2d 180, 186 (5th Cir.1981). Specifically,

these circuits have held that a trial court should weigh the party's need for anonymity against the general presumption that parties' identities be available to the public and the likelihood of prejudice to the opposing party. *Advanced Textile,* 214 F.3d at 1068 (citations omitted).

The Ninth Circuit has drawn from these precedents five factors to guide a trial court's inquiry into the need for anonymity where the party seeking anonymity is relying on a fear of retaliation: "(1) the severity of the threatened harm; (2) the reasonableness of the anonymous party's fears; and (3) the anonymous party's vulnerability to such retaliation." *Id.* (internal citations omitted). In addition, the court must determine (4) whether disclosure of the party's identity would best serve the public interest. *Id.* at 1068-69 (citing *Stegall,* 653 F.2d at 185, and observing that "'[p]arty anonymity does not obstruct the public's view of the issues joined or the court's performance in resolving them.'"). Finally, and importantly, "[t]he court must also determine [5] the precise prejudice at each stage of the proceedings to the opposing party, and whether proceedings may be structured so as to mitigate that prejudice." *Id.* at 1068 (citing *James,* 6 F.3d at 240-41).

The plaintiffs aver that certain alleged lineal descendants, including both those who are currently members of a community and those who are applying for membership in a community, would face retaliation by their respective community. Hr'g Tr. at 88-89. The government asserts that plaintiffs have not made

a compelling showing in support of their request for anonymity. Def.'s Resp. to Pls.' Mot. for Leave to Amend Compl. at 2-3.

Respecting the severity of a threatened harm in general, some courts have opined that "some embarrassment or economic harm is not enough," but rather, "[t]here must be a strong social interest in concealing the identity of the plaintiff." *Doe v. Rostker,* 89 F.R.D. 158, 162 (N.D.Cal.1981) (citing *Lindsey v. Dayton-Hudson Corp.,* 592 F.2d 1118, 1125 (10th Cir.1979)). "The common thread running through these cases [addressing requests by plaintiffs for anonymity] is the presence of some social stigma or the threat of physical harm to the plaintiffs attaching to disclosure of their identities to the public record." *Rostker,* 89 F.R.D. at 161.

In all events, for purposes of supporting their request for leave to add anonymous plaintiffs, the plaintiffs in the instant case have established that the threatened harm justifies their request. The anonymous plaintiffs not only risk economic harm through the loss of per-capita payments but also risk loss of membership in the communities in which they are, or are seeking to become, members. Plaintiffs' fears are reasonable because the communities oppose this lawsuit both jurisdictionally and on the merits, and the community governments possess nearly a plenary power over community membership. *See* Pls.' Opp'n to *Amicus* App. Ex. 9, at 2 (Prairie Island Const. art. III, §§ 4-5); *id.,* Ex. 10, at 2 (Lower Sioux Const. art. III, §§ 4-5); *id.,* Ex. 13, at 1 (Shakopee

Const. art. II, §§ 1(c), 2). Finally, lineal descendants who are either members or seeking to become members of Shakopee and Prairie Island Communities are particularly vulnerable to retaliation because they are minorities in those communities. Hr'g Tr. at 89-90.

Against plaintiffs' need for anonymity must be balanced the risk, if any, of unfairness to the government. The government asserts that pseudonyms would make difficult the task of verifying the identity, tribal membership, and ancestry of each anonymous plaintiff. The government contends that it may have to consult numerous government agents and possibly the communities themselves to obtain evidence of ancestry. Def.'s Resp. to Pls.' Mot. for Leave to Amend Compl. at 1-2. This contention is without merit. Respecting the participation of government agents in the verification of plaintiffs' lineage, all such government agents would be subject to an appropriate protective order. Those government agents would be provided with a list containing each pseudonym and corresponding true name and would be required to maintain the confidential nature of the information contained in that list. Moreover, the government could simply obtain membership lists from the communities and cross-check those lists with the list provided by plaintiffs. The government has not shown that it will be prejudiced by the addition of anonymous plaintiffs at this preliminary stage in proceedings. In this regard, it is instructive that "the balance [among the factors] . . . may change as the

litigation progresses." *Advanced Textile,* 214 F.3d at 1069.

> In cases where the plaintiffs have demonstrated a need for anonymity, the district court should use its powers to manage pretrial proceedings, *see* Fed.R.Civ.P. 16(b), and to issue protective orders limiting disclosure of the party's name, *see* Fed.R.Civ.P. 26(c), to preserve the party's anonymity to the greatest extent possible without prejudicing the opposing party's ability to litigate the case. It may never be necessary, however, to disclose the anonymous parties' identities to nonparties to the suit.

Id.

There also is no indication at this time that the public's interest in the case would best be served by requiring that all of plaintiffs' identities be disclosed. More than 250 plaintiffs are named. In the circumstances at hand, the public's interest is not unduly impaired when some additional similarly-situated plaintiffs proceed anonymously. *See Stegall,* 653 F.2d at 185. This result also accords with the practice of the Bureau of Indian Affairs in providing anonymity to loyal Mdewakanton who are involved in membership disputes with one of the communities. *See supra,* at 530 (citing Pls.' Ex. 33 (Letter from Bureau of Indian Affairs, Midwest Regional Office to Anonymous Mdewakanton (Aug. 20, 2001))).

For these reasons, the plaintiffs are granted leave to file a Second Amended Complaint that

includes some anonymous plaintiffs. An appropriate protective order will be issued at a later date.

Future Proceedings Respecting Class Certification

Despite the class allegations in this case, at the hearing on the pending motions, plaintiffs' counsel represented that he was unsure of his intentions at that time with respect to moving for certification of the class. *See* Hr'g Tr. at 86-87.

RCFC 23, unlike its counterpart in the federal rules, "contemplates only opt-in class certifications, not opt-out classes." RCFC 23 Rules Committee Note, 2002 Revision; *see also Taylor v. United States,* 41 Fed.Cl. 440, 448 (1998) ("While the district courts regularly certify class actions on an opt-out basis, the Court of Federal Claims has traditionally applied an opt-in approach to class actions."). This court applies the criteria for certifying a class set out in *Quinault Allottee Association v. United States,* 197 Ct.Cl. 134, 453 F.2d 1272 (1972). *See* RCFC 23 Rules Committee Note, 2002 Revision. The *Quinault Allottee* criteria are that:

> (1) members must constitute a large but manageable class; (2) there is a question of law common to the whole class; (3) a common legal issue overrides separate factual issues affecting individual members; (4) claims of the party plaintiffs are typical of claims of the class; (5) the Government must have acted on grounds generally applicable to the whole class; (6) the claims of many claimants

> must be so small that it is doubtful they would be otherwise pursued; (7) the party plaintiffs must adequately and fairly protect the interests of the class without conflicts of interest; and (8) the prosecution of individual lawsuits must create a risk of inconsistent or varying adjudications.

Taylor, 41 Fed.Cl. at 445 (citations omitted).

Although in this case, the large number of plaintiffs already named may constitute the functional equivalent of an opt-in class, a potential problem arises as to notice to those lineal descendants who are not named as plaintiffs. *Cf. id.* at 448 (Because "the opt-in procedure amounts to little more tha[n] a permissive joinder rule[,] . . . [i]t is . . . of limited use in informing potential class members of the suit and the claimants' right to join the suit."). The record does not indicate the extent to which such notice has been accomplished. Thus, the court must reserve for further proceedings the issues respecting class certification and notice. If class certification is sought, the notice provisions of RCFC 23(c)(2)(B) will apply, and notice will be effected in accord with those provisions. If plaintiffs do not move to certify a class or subclasses,[22] they shall propose to the court a procedure for providing notice to all lineal descendants who are

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[22] RCFC 23(c)(4)(B) provides that "a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly."

not named as parties in this action in accord with RCFC 14(b).[23] *See also Hoffmann-La Roche Inc. v. Sperling,* 493 U.S. 165, 170, 171, 110 S.Ct. 482, 107 L.Ed.2d 480 (1989) (a federal trial court has a responsibility to oversee joinder of additional parties in an orderly manner); RCFC 83(b) (courts may "regulate practice in any manner consistent with federal law or rules"). On or before January 10, 2005, plaintiffs shall either move for class certification or they shall propose means of providing notice in compliance with RCFC 14(b).

In light of the court's resolution of the dispositive motions, the government shall inform the court whether it seeks to request that summons be issued pursuant to RCFC 14(a).[24] Such notice or motion shall be filed with the court on or before February 10, 2005.

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[23] RCFC 14(b) provides in part as follows:

(b) *Notice to Interested Parties.*

(1) The court, on its own motion or on the motion of a party, may notify any person with legal capacity to sue and be sued and who is alleged to have an interest in the subject matter of any pending action. Such notice shall advise of the pendency of the action and of the opportunity to seek intervention and to assert an interest in the action.

Potential Summons under RCFC 14(a)

[24] RCFC 14(a)(1) provides that "[o]n motion of the United States, the court may summon any third person against whom the United States may be asserting a claim or contingent claim for the recovery of money paid by the United States in respect of the transaction or matter which constitutes the subject matter of

(Continued on following page)

CONCLUSION

For the reasons stated, the court denies the government's motion to dismiss this action respecting counts I (trust mismanagement) and IV (claim for attorney's fees). The court, however, grants the government's motion to dismiss count II (breach of contract) and the contract claims in count III (separately-pled claims of minor class plaintiffs). The trust mismanagement claims of count III are deemed to be subsumed within count I.

The court grants plaintiffs' cross-motion for partial summary judgment that (1) a trust was created in connection with and as a consequence of the 1888, 1889, and 1890 Appropriation Acts for the benefit of the loyal Mdewakanton and their lineal descendants, which trust included land, improvements to land, and monies as the corpus, (2) such trust was neither extinguished nor terminated by the 1980 Act, and (3) such trust was breached by the United States through actions taken in December 1980 and thereafter. The court otherwise denies the plaintiffs' motion for partial summary judgment.

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the suit to appear as a party and defend the third party's interest, if any, in such a suit."

The notice should also address this court's jurisdiction. *Compare United States v. Wurts,* 303 U.S. 414, 415-16, 58 S.Ct. 637, 82 L.Ed. 932 (1938); *DiSilvestro v. United States,* 405 F.2d 150, 155 (2d Cir.1968); *and* 28 U.S.C. §§ 1503, 2508, *with Barrett Ref. Corp. v. United States,* 242 F.3d 1055, 1062 (Fed.Cir.2001). *See generally Bank One, Michigan v. United States,* 62 Fed. Cl. 474, 477, No. 01-325C (July 31, 2003).

Plaintiffs' motion for leave to file a Second Amended Complaint is granted, as is plaintiffs' motion for leave to include anonymous plaintiffs. Plaintiffs' Second Amended Complaint shall be filed on or before January 10, 2005. A separate protective order will be issued respecting anonymous plaintiffs.

The motions to participate as *amici curiae* filed by the Lower Sioux Indian Community in Minnesota, the Shakopee Mdewakanton Sioux (Dakota) community, the Prairie Island Indian Community in Minnesota, and Raymond Cermak, Sr. are granted. The participation by *amici curiae* shall be limited to filing briefs.

On or before January 10, 2005, plaintiffs shall either file a motion for certification of a class and subclasses, or they shall file a proposed means of providing notice to interested parties pursuant to RCFC 14(b). On or before February 10, 2005, the government shall file a notice informing the court whether it seeks to request that summons be issued pursuant to RCFC 14(a).

IT IS SO ORDERED.

SUPREME COURT, U.S.
FILED
DEC 3 - 2009

Nos. 09-579, 09-580

In The
Supreme Court of the United States

SHELDON PETERS WOLFCHILD, et al.,

Petitioners,

vs.

UNITED STATES,

Respondent.

HARLEY D. ZEPHIER, SENIOR, et al.,

Petitioners,

vs.

UNITED STATES,

Respondent.

On Petitions For Writs Of Certiorari To The United States Court Of Appeals For The Federal Circuit

RESPONSE IN SUPPORT OF PETITIONS FOR WRITS OF CERTIORARI

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ISSUES PRESENTED

These Respondents support the Petitions of *Sheldon Peters Wolfchild, et al. v. United States*, Docket No. 09-579 (the "Wolfchild Petition"), and *Harley D. Zephier, Senior, et al. v. United States*, Docket No. 09-580 (the "Zephier Petition") for Writs of Certiorari. Accordingly, the following statement of "Issues Presented" derives from the "Questions Presented" raised in the Wolfchild and Zephier Petitions.

1. Whether the Federal Circuit's declaration of a "statutory use restriction," rather than a trust having been created "in connection with and as a consequence of" the 1888, 1889 and 1890 Appropriation Acts, establishes dangerous precedent with far reaching inter-circuit implications by: (a) rejecting as irrelevant the analytical guidelines and substantive Indian trust law set forth in *Carcieri v. Salazar*, 129 S.Ct. 1058 (2009); (b) ignoring the historical record of the United States' official statements acknowledging a trust; (c) ignoring Agency fiduciary treatment of the 1886 lands as the trust corpus; (d) allowing the United States to assert the opposite of its prior position in court that the trust at issue exists – which advocacy produced binding federal court holdings; and (e) departing from established principles of statutory interpretation and Indian trust law as established by *United States v. Mitchell*, 445 U.S. 535 (1980) ("*Mitchell I*") and its progeny.

ISSUES PRESENTED – Continued

2. Whether the Federal Circuit's conclusion that the 1980 Act terminated any existing trust creates erroneous precedent for Indian trust law, by dropping the requirement that a trust terminating statute be "clear and unambiguous" and encouraging the United States to take litigation positions which contradict its own prior statutory interpretations and administrative practices, particularly where: (a) the 1980 Act recites that the subject lands were being "held for the use and benefit of the heirs of Loyal Mdewakantons"; (b) never states that those benefits are intended to be nullified; (c) provides no notice of termination; and (d) Congress' own statements in the 1980 Act and related House and Senate Reports pronouncing that the 1980 Act was intended to "enhance" the beneficiaries' rights, effect "no change in existing law," and only produce "a technical change in the status" of the 1886 trust corpus lands.

3. Whether the principle of law established in *United States v. Mitchell*, 463 U.S. 206 (1983) ("*Mitchell II*") that "a general trust relationship between the United States and the Indian people exists" has been now overruled by the Federal Circuit opinion and replaced by a new standard strictly construing Native American statutes in favor of the government and against Indian beneficiaries.

LIST OF PARTIES

A list of parties has been provided to the Clerk of Court for the Supreme Court under a separate filing due to the numerous Plaintiff-Respondents represented (in excess of 400 individuals).

CORPORATE DISCLOSURE STATEMENT

These Plaintiff-Respondents are not and do not represent a nongovernmental corporation.

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OPINION BELOW

This Responsive Brief is submitted by 424 plaintiff heirs of the Loyal Mdewakantons ("Plaintiff-Respondents" or "these Respondents") in support of the Petition for Writ of Certiorari of *Sheldon Peters Wolfchild, et al. v. United States*, Docket No. 09-579, and the Petition for Writ of Certiorari of *Harley D. Zephier, Sr., et al. v. United States*, Docket No. 09-580.

These Plaintiff-Respondents accept and support the statements of the "Opinion Below" as referenced in those Petitions.

STATEMENT OF JURISDICTION

These Respondents accept and support the "Statements of Jurisdiction" as set forth in the above-identified Petitions.

STATUTORY PROVISIONS INVOLVED

Pertinent provisions of the February 16, 1863 Act, 12 Stat. 654, Preamble in §§ 1 through 9; March 3, 1863 Act, 12 Stat. 819, Preamble in §§ 1 through 6; 1888, 1889 and 1890 Appropriation Acts: Act of June 29, 1888, 25 Stat. 217 at 228; Act of March 2, 1889, 25 Stat. 980 at 992; Act of August 19, 1890, 26 Stat. 336 at 349; relevant provisions of the original Indian Reorganization Act of 1934, as amended, 25 U.S.C.

§§ 462, 463, 465 and 479, Indian Reorganization Act of 1934 (as reprinted in Wolfchild Petition Appendix at 159-160); and the Act of December 1980, Pub. L. 9-557, 94 Stat. 3262.

STATEMENT OF THE CASE

INTRODUCTION

This case involves judicial revocation of a trust created by Congress a century and a half ago to protect and reward certain Native Americans for extraordinary acts of loyalty, compassion and courage in the Dakota Uprising of 1862. During that conflict, a group of Mdewakanton Sioux sacrificed their filial and tribal connections, relinquished their property, and risked their lives and families, to save the lives and property of neighboring settlers and their families. It was an honorable act of great sacrifice which severed these Native Americans from their prior tribal relations forever.

After the 1862 Dakota Uprising was defeated, Congress meted out punishment to the Dakota tribal members: taking away their reservation lands, their annuities, and banishing and executing many of their numbers – using language of outrage and retaliation. See Act of February 16, 1863.[1] Yet even in the passion of that legislative excoriation, Congress was moved to

[1] 12 Stat. 652, App. 1-6.

recognize and reward the extraordinary sacrifice of those Indians – the "Loyal Mdewakanton" – who risked so much in their refusal to participate in the "massacre." Acknowledging that sacrifice, Congress reserved to those Loyal Mdewakanton the benefits which they had previously enjoyed by treaty but which were now terminated in response to the Dakota Conflict. Those former treaty rights now reserved to the Loyal Mdewakanton consisted of land and support granted, in Congress' words, as an "*inheritance to said Indians and their heirs forever.*"[2]

This was a good and proper thing to do. Thereafter, for 150 years, consistent with Congressional intent, the Department of the Interior held, referenced and administered these lands and support "in trust" for the benefit of the Loyal Mdewakanton – a trust which the Loyal Mdewakanton and their heirs understood and relied upon.

Now, with a decision which altered fundamental trust principles, ignored a century of Interior Department treatment of the trust corpus, misconstrued clear statutory language, and declared "irrelevant" precepts of this Court to guide analysis of such claims, the U.S. Court of Appeals for the Federal Circuit has declared that the Loyal Mdewakanton reliance upon this trust benefit was illusory. The result is that over twenty thousand surviving heirs of the Loyal

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[2] Id. at § 9, App. 6.

Mdewakanton suddenly and forever lost the legacy of their ancestors' great sacrifice.

This Court should accept the Petitioners' Writs of Certiorari and correct this far reaching injustice. This is an injustice which not only divests tens of thousands of Native Americans of their trust inheritance, but also calls into question the trust worthiness of the United States.

FACTUAL BACKGROUND

This case is rooted in undisputed history[3] – that a group of Minnesota Native Americans elected to save white settlers from attack and death at the hands of their own tribal relations. As a result of that extraordinary event, Congress chose to create a trust of land and other assets for these "Loyal Mdewakanton" and their "heirs forever."

This historic underpinning cannot be set aside, leaving the emergent statutes to be parsed and dissected in legalistic isolation. Rather, the intent and meaning of the subject statutes can only be accurately gleaned with a full appreciation for their historical context. Once analyzed from a correct historical understanding, the conclusion is inescapable that grave errors of law were committed by the U.S.

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[3] The Wolfchild and Zephier Petitions, and several District Court opinions below, cover the facts in detail. This response simply highlights critical points.

Court of Appeals for the Federal Circuit in this case, with serious negative implications for tens of thousands of surviving heirs of the Loyal Mdewakanton and other Indian trust beneficiaries.

During the Dakota Conflict of 1862 (the "Conflict" or "Dakota Conflict"), the Loyal Mdewakanton were not motivated by money, but compassion, when they risked their property, their lives and their tribal relationships to save white Minnesota settlers. Yet only when the Conflict ended did the full import of their sacrifice become clear. Many among the white population of Minnesota reviled the Loyals for their racial and tribal connection to the perpetrators of the violent uprising. At the same time, the tribes as a whole severed relations with the Loyals for their refusal to join the insurgency – and for their protection of the white settlers.

In an atmosphere of outrage and retribution following the Conflict, the United States Congress passed legislation on February 16, 1863 (the "February 1863 Act").[4] That Act's very title expressed the anger of the legislators at the mass killing of white settlers:

> *"An Act for the Relief of Persons for Damages sustained by Reason of the Depredations and Injuries by certain Bands of Sioux Indians."*[5]

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[4] 12 Stat. at 652, App. 1-6.

[5] Id., App. 1.

The preamble of the Act expanded on this theme:

> "[D]uring the past year the aforesaid bands of Indians made an unprovoked, aggressive and most savage war upon the United States and massacred a large number of men, women and children within the State of Minnesota, and destroyed and damaged a large amount of property. . . ."[6]

The February 1863 Act gave full voice to Congress' indignation by annulling *any and all* treaty rights inuring to the benefit of the rebel Dakota bands. As a result, these bands lost their perpetual and term annuities; all property rights in reserved lands; and all claims against the United States derived from their treaties:

> "*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That all treaties heretofore made and entered into by the . . . bands of Sioux or Dakota Indians . . . with the United States are hereby declared to be abrogated and annulled, so far as said treaties or any of them purport to impose any future obligation on the United States, and all lands and rights of occupancy within the State of Minnesota, and all annuities and claims heretofore accorded to said Indians, or

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[6] Id., App. 1.

> any of them, to be forfeited to the United States."

(Emphasis added).[7]

Following this language of annulment and abrogation, the February 1863 Act went on, through eight sections, to establish a process for injured Minnesota settlers to obtain compensation for their losses from the terminated treaty annuities. The final Section 9 of the Act, while continuing the theme of compensation and restoration, took a decidedly different turn. Section 9 focused entirely upon honoring and providing for those loyal Indians who had "exerted [themselves] in rescuing the whites from the late massacre. . . ."[8]

The significance of this final section can only be understood in the dramatic context of the fury which led Congress to annul the Dakota treaties. Section 9 of the Act recognized the sacrifice of the Loyal Mdewakanton and effectively granted back to them

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[7] Id., App. 1-2. The volume of treaty rights annulled by this Act reflects the magnitude of Congressional anger. These included an 1837 treaty with the Mdewakanton and other Minnesota bands which created reservation lands and a perpetual annuity (7 Stat. 538); and an 1851 treaty with the Mdewakanton and Wahpekute Bands of Minnesota which created a supplemental fifty-year annuity (10 Stat. 954).

[8] Id., App. 6.

the treaty rights now otherwise abrogated for the warring bands:

> "Sec. 9. *And it be further enacted* That the Secretary of the Interior is hereby authorized to set apart of the public lands . . . eighty acres in severalty to each individual of the before-named bands who exerted himself in rescuing the whites from the late massacre of said Indians. The land so set apart shall not be subject to any tax, forfeiture, or sale, by process of law, and shall not be aliened or devised, except by the consent of the President of the United States, *but shall be an inheritance to said Indians and their heirs forever.*"[9]

(Emphasis added).

The trust created by this Act was not only intended to reward the Loyals for their courage, but also to protect those few Loyals who remained in Minnesota. The expulsion of rebel Dakota Indians from Minnesota following the Conflict ultimately caused the Minnesota Mdewakanton population to fall from between 6,000 and 10,000 people in 1862 to approximately 200 Loyal Mdewakanton in 1886. The remaining Loyals thus became subject to the desire for vengeance and the fears of many Minnesota surviving settlers.

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[9] 12 Stat. at 654, App. 1-6.

In its 2009 opinion, the Federal Circuit recognized the significance of the February 1863 Act as creating a trust for the Loyal Mdewakanton. In the words of the Federal Circuit, the February 1863 Act defined the property interest that the Indians were to receive in the lands set aside for them. The Federal Circuit acknowledged that the language of that Act "clearly would have created an inheritable beneficial interest in the recipients of any land conveyed under the statute."[10] The Federal Circuit mistakenly ruled, however, that this language was "superseded" by another statute passed by Congress two weeks later, on March 3, 1863 (the "March 1863 Act").[11]

The March 1863 Act was entitled "*An Act for the Removal of the Sisseton, Wahpaton, Medawakanton and Wahpakoota Bands of Sioux and Dakota Indians for the Disposition of their Lands in Minnesota and Dakota.*"[12] The March 1863 Act was not a nullification of the February 1863 Act, nor did it supersede the February Act. Rather, the March Act continued and expanded upon the February 1863 Act by

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[10] *Wolfchild, et al. v. United States*, 559 F.3d 1278, 1282 (Fed. Cir. 2009), Wolfchild Petition, App. 7.

[11] 12 Stat. 819, App. 7-10.

Notably, it does not appear the March 1863 Act was raised by the defendant United States in any of its moving papers or oral argument, nor in the lengthy and scholarly October 27, 2004 Opinion and Order of the Honorable Judge Charles Lettow which underlay the appeal to the Federal Circuit. Its first appearance in this case was in the Federal Circuit Judgment.

[12] 12 Stat. 819, App. 7-10.

extending to the Secretary of the Interior authority to use confiscated tribal lands as a potential source of the corpus of that trust. In summary, the March Act authorized and guided the President and the Secretary of the Interior: (a) to assign new lands outside Minnesota to the warring band members exiled from Minnesota after the Conflict (Section 1);[13] (b) to survey and prepare for sale the former reservation lands of the warring bands (Section 2);[14] (c) to permit entry and settlement of these reservation lands following auction (Section 3);[15] and (d) to apply the proceeds from such sale to the construction of new homes for the warring bands in their new reservation lands (Section 4).[16]

Of particular significance here, however, the March Act further provided that the Secretary was allowed to locate:

> " . . . any meritorious individual Indian of said bands, who exerted himself to save the lives of the whites in the late massacre, upon [the prior Dakota reservation lands] . . . *assigning* the same to him to the extent of eighty acres, to be *held* by such tenure as is or may be provided by law."[17]

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[13] 12 Stat. 819, App. 7.

[14] 12 Stat. 819, App. 7-8.

[15] 12 Stat. 819, App. 8.

[16] 12 Stat. 819, App. 9.

[17] 12 Stat. 819, Section 4, App. 9.

(Emphasis added). Coming only two weeks after the February 16 Act which directed creation of a trust of inalienable land to be held for the Loyal Mdewakantons and their heirs forever, the March Act permitted the Secretary of the Interior to use parcels of former reservation lands to achieve that purpose.[18]

Nowhere in the March 1863 Act was there any language stating or implying the Federal Circuit's contrary conclusion: that the March Act superseded the February 1863 Act. Nor is there any Congressional history in the record to suggest such a goal – a goal which makes no sense given the clearly expressed intent of Congress only weeks earlier to provide for the Loyal Mdewakanton and their heirs "forever."

While the record is sketchy of the Interior Department's initial efforts to provide land and support to the Loyal Mdewakanton in compliance with the 1863 Acts, it is clear that the February and March 1863 Acts' provisions for the Loyal Mdewakanton were ultimately funded in the Congressional Appropriation Acts of 1888, 1889 and 1890.[19] Thereafter, the land and other resources appropriated for the benefit of the Loyal Mdewakanton were held and

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[18] Notably, the assignment mechanism described in the February and March 1863 Acts for insuring that the Loyal Mdewakanton land remained inalienable "forever" was applied over the next century to the lands acquired in 1888 and thereafter "*held*" by the United States, "*set apart*" for individual Loyals, and "*assigned*" to them as life estates.

[19] Wolfchild Petition, App. 154-156.

administered by the Department of Interior toward that end.

The fiduciary relationship resulting from the February and March 1863 Acts and the funding Appropriation Acts of 1888, 1889 and 1890 was honored by the government for the next one hundred years. Hundreds of documents were officially recorded by Interior reciting the trust corpus lands as being "held in trust," and governmental actions consistently treated the lands and other resources as trust assets held exclusively for the benefit of the Loyal Mdewakanton heirs.

Examples of actions by the Department of the Interior and Congress consistent with recognition of a fiduciary obligation over the next century included, among other measures:

- Creating an assignment system by which legal title to the land remained in the United States' name, but land was assigned for beneficial use by the Loyal Mdewakanton and their heirs;
- Creating evidence of land assignments to the assignees which certified that the particular land recipient "and his heirs are entitled to immediate possession of said land, which is to be held *in trust* by the Secretary of the Interior, for the

exclusive use and benefit of the said Indian"[20] (Emphasis added);

- Requiring unanimous approval, in 1901, of all Loyal Mdewakanton for the proposed sale of a small section of the 1886 trust lands, "The land was purchased for ... [the] benefit [of the Loyal Mdewakanton], and the title is in them subject to a provision by which they cannot convey it;"[21]

- Passage of the 1934 Indian Reorganization Act ("IRA") which provided for the continuation of all trust rights and benefits then existing and Interior's continuing practice of holding and administering the corpus lands consistent with the IRA; and

- Acknowledging, in the sale of a tract of the 1886 lands in 1944, that the transfer and sale of the tract operated as a "full, complete and perfect extinguishment" of all the "right, title and interest" that the Mdewakanton and Wahpakoota bands have had in the tract.[22]

Finally, in 1980, certain Indian communities which had been organized pursuant to the 1934

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[20] Indian Land Certificate of Harry Bluestone (June 1, 1905), Wolfchild Petition, App. 139-142.

[21] 34 Cong. Rec. 2523 (1901).

[22] Act of 1944, § 2, 58 Stat. at 274.

Indian Reorganization Act,[23] sought greater control over the lands acquired for the Loyal Mdewakanton. Those trust corpus lands were contiguous with additional non-trust lands controlled by those communities – creating a "checkerboard" pattern of ownership interests which impeded the development. A bill was proposed to eliminate the long standing recognition of distinctions between these Indian community lands acquired and held by the United States exclusively for over a century for those Native Americans "who were descendants of the 1886 Mdewakanton and who had exclusive rights to the benefit of the 1886 lands."[24] Congress ultimately passed the bill, and it was signed into law by President Carter on December 19, 1980.[25]

In the Senate Report of the 1980 Act, Congress emphasized the United States' continuing fiduciary obligations to honor the Loyal Mdewakanton beneficiaries' rights when it explained that the purpose of the 1980 Act was to "enhance the beneficial use of the land." The Report further clarified that the 1980 Act would make "no change to existing law" and would affect only a "technical change in status" of the land. Nowhere did Congress state or even suggest: (a) that those century-old rights were to be nullified; (b) that

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[23] See Act of 1934, 25 U.S.C. §§ 462, 463, 465 and 479, Indian Reorganization Act, *et seq*.

[24] H.R. Rep. No. 96-1409 (1980), App. 40-41.

[25] 126 Cong. Rec. 32,898 (1980), App. 40-41.

the trust relationship was to be abolished; or (c) that beneficiaries were to be forever barred from enjoyment of the benefits flowing from the 1886 lands.[26]

Only subsequent to the 1980 Act, despite the absence of any authorization to abolish the acknowledged rights of these beneficiaries, did the United States abandon the heirs of the Loyal Sioux. Rather than ensuring that the new Indian communities and the Interior Department coordinate and develop the community lands with those held for the Loyal Mdewakanton so as to benefit *both* the distinct communities and the Loyal Mdewakanton beneficiaries, the government suddenly allowed *all* benefits to flow only to the communities' own members to the exclusion of the thousands of Loyal Mdewakanton.

Since that time, the Loyals' trust corpus lands have been employed for the enrichment of the controlling communities and their narrowly enrolled members. Ninety-five percent of the Loyal beneficiaries have been excluded from membership in those communities. Yet the government has set aside nothing for the use and benefit of these Respondents or the Wolfchild and Zephier Petitioners.

This breach of the fiduciary duty of the government, established in the legislation of 1863 through 1896, continues to the present day.

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[26] App. 40-41.

REASONS FOR GRANTING PETITIONS

As expressed in the Petitioners' arguments, and supported by the following Respondents' arguments, in order to reach its result the Federal Circuit Court of Appeals incorrectly:

(1) Adopted a conclusion and position contrary to government practice and pronouncements for over a hundred years, and never taken in prior litigation of these issues by the United States – that no legal trust ever existed;

(2) Focused on only the last step in the trust creation process – the Appropriation Acts funding the trust – and ignored the role of the 1863 Act in creation of the trust;

(3) Ignored the evolution of Indian treaty and trust law over a 120 year period by insisting upon an explicit declaration of a "trust" in the Appropriation Acts funding the trust corpus;

(4) Ignored clear Congressional intent, expressed in the 1863 Act, to establish a trust in perpetuity for the heirs of the Loyal Mdewakanton;

(5) Misconstrued the 1980 Act contrary to its language and history; and

(6) Disregarded the *Carcieri* decision, at 129 S.Ct. 1058, 172 L.Ed.2d 791 (2009).

These Respondents therefore support Petitioners' prayer for review and reversal of the Federal Circuit's opinion, as argued more fully below.

I. The Federal Court of Appeals Opinion Shattered the Loyal Mdewakantons' "Trust" By Adopting a Conclusion Contrary to Government Practice and Pronouncements for Over a Hundred Years, and Never Taken By Any Party or Court Before This Litigation – That No Legal or Equitable Trust Ever Existed.

The sacred significance of a trust is highlighted by the word itself. Here, in 1863 through 1890, Congress set forth the historical foundation, legislative purpose and the means for establishing a trust relationship between the United States government and the Loyal Mdewakanton. Congress entrusted the executive branch with authority and responsibilities: to purchase and hold lands, and manage the resulting corpus for the use and benefit of the Loyal Mdewakanton and their heirs forever. In turn, the beneficiaries placed their "trust" in the good faith of the government to act consistent with its promises. For over one hundred years, that trust was honored and the beneficiaries' reliance on the government was affirmed.

Even in the Act of 1980, Congress once again recognized the long-standing existence and purpose of the trust corpus for the "use and benefit" of the Loyal Sioux. Both the House and Senate Report(s) to the

1980 Act stated unequivocally that the intent of that Act was to "enhance" the benefits owed to the Loyal Mdewakanton.[27] Thus from 1863 through 1980 and beyond, the trust between the federal government and the Loyal Sioux was maintained.

Only subsequent to these acknowledgments did the government begin to deviate from its fiduciary mandate by allowing trust corpus assets to be used to benefit exclusively Community members. Yet membership in the communities consists of less than five percent of the class of intended beneficiaries (heirs of the Loyal Mdewakanton) and includes a large percentage of non-beneficiaries (heirs of Sioux who were not among the Loyal Mdewakanton). Thereby the trust, in all of its meanings, was broken.

The District Court, with the benefit of years of briefings and hearings, understood this history, the statutory creation of the trust, and its breach. Unfortunately, the Federal Circuit panel did not. By adopting the United States' contention that no trust *ever* existed – a contention never previously claimed in any other litigation relating to these issues – the Federal Circuit rendered irreparable what was heretofore only broken.

What relationship has existed for the past century between the United States and the Loyal Mdewakanton, if not a trust? What does the current

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[27] App. 11-39.

opinion say to the thousands of heirs about the sanctity of their ancestral rights or their relationship with the federal government? What does this decision suggest to Native Americans across the century about the fragility of placing their trust in the government's promises? This case cries out for review.

II. The Federal Circuit Focused on Only the Last Step in the Trust Creation Process – the Appropriation Acts Funding the Trust – and Ignored the Role of the 1863 Act in Authorizing the Creation of the Trust.

In the Federal Circuit's analysis of the issues in this case, it ignored or misinterpreted the February 1863 Act and related legislation, reviewing the subsequent Appropriation Acts in isolation from their source.[28] This analysis was both legally and factually improper.

The Honorable Judge Charles Lettow of the United States Court of Federal Claims had the benefit of years of experience and lengthy hearings, briefs, and argument when he certified the questions for determination by the Federal Circuit. With the

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[28] In fact, the Federal Circuit restated the carefully worded certified question to support this method of evaluating the issues, recasting the lower Court's certification of the issue from whether a trust was created "in connection with and as a consequence of" the Appropriation Acts, to whether the Appropriation Acts themselves, in isolation, created a trust.

benefit of this knowledge, Judge Lettow did not ask whether the Appropriations Acts of 1888, 1889, and 1890, in isolation, created a trust. The Court of Claims recognized the importance of the dramatic historical context and the *origin* of the trust in the authorizing language of the February 1863 Act. The Court of Claims further understood that the *trust corpus* at issue was ultimately acquired by the United States pursuant to the Appropriation Acts of the 1880's. These Appropriations Acts were necessary to establish the final trust corpus – but they drew authority from the February 1863 Act announcing the creation of the trust.

Accordingly, the certified question from the Court of Claims asked: "[W]hether a trust was created *in connection with* and *as a consequence* of the . . . Appropriation Acts. . . ." (Emphasis added). Thus, the issue was whether a trust was created not in isolation, but in conjunction with, the 1888-1890 legislation.

The Federal Circuit's analysis looked exclusively to the Appropriation Acts for what it deemed was essential language necessary for creation of the trust – i.e. the Appropriation Acts were required to stand alone in the creation of a trust.[29] With this

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[29] As argued by the Wolfchild Petitioners, it was further error for the Federal Circuit to assert that *any* particular language was required in the statute to establish a trust, so long as the indices of a trust existed.

inexplicably myopic approach to the certified questions, the Federal Circuit reached the conclusion that the Appropriation Acts, standing alone, did not create a trust.

The Federal Circuit did recognize that the February 1863 Act could not be entirely ignored if it was to conclude that no trust was created for the Loyal Mdewakanton. The Federal Circuit acknowledged that:

> "[The February 1863 Act] language clearly would have created an inheritable beneficial interest in the recipients of any land conveyed under the statute."[30]

The Federal Circuit went on to conclude, however, that the subsequent March 1863 Act "superseded" the February 1863 Act, and therefore that the trust creating language of the February 1863 Act could be ignored in its analysis.

The Federal Circuit's conclusion that the March 1863 Act superseded the prior February Act was reached without reference to any language in the March Act which would support such a conclusion, nor with any citation to legal authority for this conclusion. In fact, in order to reach its result, the Federal Circuit ignored longstanding precedent of this Court that repeals of legislation by implication are disfavored and that, in the absence of an affirmative showing of a legislative intention to

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[30] Wolfchild Petition, App. 29.

repeal, the only permissible justification for repeal by implication is irreconcilability.[31]

Consistent with this rule, the intention of the legislature to supersede a prior statute must be clear and manifest: it is not sufficient to establish such a repeal that a subsequent law covers some or all of the cases provided for by the prior act.[32] If, by any reasonable construction, two statutes on the same subject could stand together, they are required to so stand.[33]

In the face of this black letter law, there was no basis for the Federal Circuit to conclude that the March 1863 Act superseded the February Act. In fact, it was not even a close issue. As discussed above, there is no language whatsoever in the March 1863 Act even suggesting a statement of intent to supersede the legislature's two week old direction to the Secretary of the Interior to establish lands and support for the Loyal Mdewakanton and their "heirs forever." Neither was the March 1863 Act itself in any way irreconcilable with the February 1863 Act.

Accordingly, the Federal Circuit could only reach its erroneous decision by recasting the certified

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[31] See *State of Georgia v. Pennsylvania R. Co.*, 324 U.S. 439; 5 S.Ct. 716; 89 L.Ed. 1051 (1945).

[32] See *U.S. v. Borden Co.*, 308 U.S. 188, 60 S.Ct. 182, 84 L.Ed. 181 (1939).

[33] See *J.E.M. Ag Supply Inc.v. Pioneer Hi-Bred Intern., Inc.*, 534 U.S. 124, 122 S.Ct. 593, 151 L.Ed. 508 (2001); and *State of South Carolina v. Stoll*, 84 U.S. 425 (1873).

question presented to it; ignoring long standing precedent of this Court as to when subsequent legislation can be deemed to supersede prior Congressional Acts; and thereby conclude with a decision which negated the expressed will of Congress to create inheritable trust rights in the February 1863 Act.

This Court should correct this manifest error.

III. The Federal Circuit Opinion Ignored Long-Standing Indian Treaty and Trust Law By Declaring the Necessity of an Explicit Declaration of a Trust in the Appropriation Acts Funding the Trust Corpus.

As argued above, the standing opinion collapses because its critical assumption, that the March 1863 Act superseded the February 1863 Act, is incorrect as a matter of law. The Federal Circuit opinion rests on and requires the false conclusion that the 1863 Acts (authorizing the establishment of a land set aside, and assignments of a trust corpus of land) had no legal or equitable effect. Despite the absence of any legal or evidentiary support for such a conclusion, the Federal Circuit asserted: "Two weeks after the enactment of that provision [Feb. 16, 1863 Act, Sect.

9], . . . Congress superseded it with another statute dealing with the same authorization."[34]

Native Americans have long held a strained relationship of suspicion toward the federal government. That history need not be repeated in this brief. However, that relationship will not be improved by allowing the Federal Circuit's decision to stand. The lessons are stark. Despite sacrificing for the country and receiving protection and provision for that courage, Indians still cannot count on the government to keep its promises.

The ancestors of the Petitioners here sacrificed everything for their neighbors. To replace treaties annulled for no fault of theirs, these Indians were promised the benefit of lands to be held and managed by the government to honor their loyalty, courage and suffering. The government repeatedly reassured them by recognizing and maintaining the resulting trust for a century. Congress eventually promised the beneficiaries that it would "enhance" their benefits by legislating "technical changes in the status" of the trust lands that would "effect no change in existing law." The government even maintained in official court documents and established by federal court rulings that a trust exists.[35]

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[34] Wolfchild Petition, App. 7.

[35] See *Brewer v. Acting Deputy Assistant Secretary*, 10 IBIA 110, 119 Note 8 (1982); *Cermak v. Babbitt*, 234 F.3d 1356, 1358-59 (Fed. Cir. 2000); and *Cermak v. Norton*, 322 F.Supp.2d 1009,

(Continued on following page)

Nevertheless as it stands, the courts may eradicate these Native Americans' ancestral rights and benefits, using a 120-year retrospective insistence on an explicit declaration of a "trust" in appropriation acts funding the trust corpus. This is not consistent with the hard-fought evolution of Indian treaty and trust law.

IV. The Federal Circuit Ignored the Clearly Expressed Intent of Congress to Establish Perpetual Rights in the Loyal Mdewakanton and Their Heirs.

The congressional intent to honor the courage and sacrifice of the Loyals during a most trying period in American history consistently appears in the unique treatments specifically given to Loyals by the Department of the Interior through the next hundred years. This should be given great weight. Examples abound in the record.[36]

Nowhere does the 1980 Act notify, suggest, authorize or mention a termination of these rights and benefits of the vast majority of beneficiaries.

1015 (D. Minn. 2004), aff'd, *Cermak v. United States*, 478 F.3d 953 (8th Cir. 2007).

[36] See Interior Department practices with respect to holding of monies (JA0825, 1737, 2543 and 3573-78); holding of monies from gravel pit and quarry receipts (JA2539-45); and Land assignment certificates (JA0940-44, 1144, 1146, 1150-51, 1153 and 2009-23).

Instead, the 1980 Act recognizes and furthers the mandate of the 1863 Acts and the enabling acts of 1880-1890. The 1980 Act addresses barriers to the beneficiaries' ability to enjoy the most productive use of the 1886 lands due to the barriers created by a jurisdictional checkerboard ownership pattern. By allowing community development of a seamless pattern of land ownership, the referenced benefits to the Loyals were to be "*enhanced*" – not obliterated. One can only imagine the outcry in and to Congress had it understood – as the government now argues – that it was cancelling one hundred years of fiduciary obligations and cutting off rights and benefits of thousands of descendants of the Loyal Mdewakanton. Had the Federal Circuit's radical interpretation been predicted, not only would the Act have lacked any language supporting such a conclusion: the Act would have been replete with language insuring no such affect.

In addition to the bill itself, the 1980 Act's legislative history directly contradicts the claim that it terminated the Loyals' trust:

- The Senate Report concludes that the passage of the 1980 Act would effect "no change in existing law."[37] Yet, the Federal Circuit's interpretation would radically change over one hundred years of existing law.

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[37] App. 39.

- The House and Senate Reports state that the bill is only a "technical change in the status" of the 1886 lands – not a radical shift in benefits, rights and ownership to the exclusion of ninety-five percent of the beneficiaries.[38]

- The House and Senate Reports reassure the legislature that the bill "protects the rights of all persons having a present interest in the lands."[39] The Loyals were the only persons with a present interest in the lands.

- The House and Senate Reports further state, "The purpose [of the 1980 Act] is to change and clarify the legal status of the lands . . . in order to *enhance the beneficial use* of the lands to be . . . " (Emphasis added).[40] "Enhance" whose beneficial use? Only the Loyals held any rights to beneficial use and only their rights could be "enhanced." The recently formed communities had no such beneficial use to enhance. But consistent with Petitioner's positions, the communities' ability to manage seamless reservation property *would* "enhance the beneficial use" of the Loyals – as well as

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[38] App. 11-39.

[39] App. 11-39.

[40] App. 40-41.

provide some advantage to non-Loyals, as the 1980 Act recognizes.[41]

- The House and Senate Reports further state that there will be "no additional cost to the government." Why? Because the bill enhanced the rights of Loyals and also contributed to the ability of communities to better manage their entire reservation property to the benefit of the communities and beneficiaries alike. Thus, no one was damaged or harmed by the 1980 Act. Accordingly, there was no controversy and no anticipation of litigation for the loss of benefits to thousands of Loyals as would have been obvious had that been the bill's intent.[42]

- The House and Senate Reports make no mention, despite lengthy descriptions of the 1980 Act and its purposes, of annulling rights and benefits provided to Loyals for 100 years. Nor do the Reports suggest that there is any annulment of the Congressional intent emphatically expressed in the 1863 Act, the 1888-1890 Appropriation Acts and the many acts following that all recognized the rights of the Loyals.[43]

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[41] App. 40-41.

[42] App. 40-41.

[43] App. 11-39.

In summary, the seamless history of Congressional action and pronouncements toward the Loyal Mdewakanton from 1863 through 1980 all demonstrate consistent and unbroken Congressional intent to honor the Loyal Mdewakanton and their heirs forever.

V. The Federal Circuit's Opinion Rewrites the 1980 Act Contrary to its Language and History.

What the Federal Circuit opines as Congressional intent in 1980 was never presented in any of the House or Senate Reports or on the House floor, nor does it appear in the language of the statute itself. Moreover, this interpretation does not square with any of the history of the trust relationship between the government and the Loyals flowing seamlessly from 1863 on.

The Court's ignoring of that history is telling. As the 1980 Act makes clear, the history of the acquisition of the 1886 lands flows directly from the sacrifice and loss suffered by the Loyals in the 1862 uprising as recognized in the 1863 Act. Congress' concerns in 1980 that the "held" land was not receiving its highest and best use for the benefit of the Loyal heirs, due to practical problems of efficient investment and effective jurisdiction, is also clearly stated.

The Congressional concern expressed in the 1980 Act is for the Loyals – no one else. Yet the decision of

the Federal Circuit would reach a contrary end: completely strip the very ancestral rights of those beneficiaries which the Congress expressly recognized and sought to "enhance." It is entirely unreasonable to conclude that the Congress intended such a result without any notice of trust termination and without mention of any intent to abolish or reverse beneficial rights flowing from 1863 through the 1880-1890 Acts. Nor is there any expressed intention – unlikely in any event – that Congress sought to transfer these benefits to non-beneficiary members of newly formed communities.

The Federal Circuit reading inverted Congressional intent, rewrote American history, and adopted the United States' after-the-fact attempt to rationalize its failure to perform its fiduciary role as trustee of the Loyals' beneficial rights in the 1886 lands.

VI. The Federal Circuit Disregarded *Carcieri*.

Two weeks before the Federal Circuit panel issued its opinion here, this Court announced its decision in *Carcieri*, *supra*. That decision was brought to the attention of the panel. However, rather than applying its precepts, the Circuit dismissed it in a

footnote as not "in any way relevant" to the issues herein."[44]

This response was stunning. *Carcieri* dealt with the issues directly relevant to the present case. In *Carcieri*, the Court considered the proper interpretation of statutory authorizations related to Indian trusts (the 1934 Indian Reorganization Act); utilized extensive evidence of the Department of the Interior's own understanding and application of the statute; reversed the First Circuit's and District Court's holdings in favor of the federal government's granting extensive trust rights to certain newly formed Indian communities; and rejected the government's arguments that it was authorized by statute to do so.

Thus, this Court in *Carcieri* provided direction in Indian trust cases – direction dismissed by the panel as having any bearing on this case. In particular, the Court's historically detailed analysis of the precise meaning and intent of the IRA statute did not stop at only an internal examination of the rhetoric of the bill *in isolation*, but put substantial weight on the government's documented interpretation of that language and its management of the issue with the same party. Yet, the Federal Circuit dismissed that analysis in one footnote and ignored the hundreds of exhibits of documented evidence that established objectively the countless times that the 1886 lands

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[44] Wolfchild Petition, App. 53.

were referenced as held in trust for the Loyal Mdewakanton's benefit. In short, the Federal Circuit panel did what the courts in *Carcieri* did – which subjected the latter courts to reversal.

The *Carcieri* decision was pointedly brought to the panel's attention, yet with no analysis, the panel waived aside the Supreme Court's guidelines for looking at how, when, and whether the government places assets in trust for the benefit of Native American groups – especially involving communities not recognized at the time of the 1934 IRA.

The Supreme Court should reestablish and enforce the guidelines it provided in *Carcieri*.

In addition, the Federal Circuit's opinion ignored not only the analytical guidelines, but the *holding* of *Carcieri*. As such, it created a quagmire of issues that could and should have been avoided.

As it stands, the instant opinion concludes that, despite 100 years of trust management and repeated reassurance of the trust's existence and benefit, no trust ever existed. Yet, the Court then views the 1980 Act as authorizing the Department of the Interior to abolish all beneficial rights to land purchased and held for a specific group of Indians recognized since 1863 and to transfer all rights and benefits exclusively to small Indian communities – communities which did not exist in 1934 at the time of the IRA's passage. Consistent with *Carcieri*, the government

had *no* authority under the IRA to establish this new trust. If, as Petitioners argue and the evidence proves, the land was *already* held in trust for the benefit of a distinct group of Indians (the Loyals), recognized since 1863, there is *no* contradiction with *Carcieri*'s holding a trust already existed and the denoted beneficiaries' rights were to be "enhanced" in 1980 to allow the land's highest and best use for the benefit of the Loyal heirs. That effort to enhance the benefits to the designated beneficiaries was exactly what a trustee exercising its fiduciary responsibilities should have done in any case. That the government later failed to follow that 1980 Congressional mandate and breached its fiduciary duty to the Loyals does not change the historical or legal fact that a trust relationship had existed with the Loyals for over one hundred years and was not extinguished by the 1980 Act's enhancement of beneficiary rights.

VII. The Federal Circuit Opinion Appears to Create a New Strict Construction Standard and Rejects the Principle of a "General Trust Relationship Between the United States and the Indian People."

There is no dispute that the 1886 lands have been acquired, held and managed for the use and benefits of Loyal Mdewakanton for over a century. Particularly in light of the unique history here, this relationship is consistent with the principle that

there exists a "general trust relationship between the United States and the Indian people," *United States v. Mitchell*, 463 U.S. 206, 225, 103 S.Ct. 2961, 77 L.Ed.2d 580 (1983) ("*Mitchell II*").

Yet, disregarding the general trust principle of *Mitchell II*, the Federal Circuit adopted the opposite approach – one of strict *statutory* construction against the existence of a trust. Where does this leave the principle enumerated in the *Mitchell* decisions? Has that principle been now discarded?

All Native Americans have an interest in the resolution of this issue. It deserves careful and clear consideration by this Court.

CONCLUSION

The Wolfchild and Zephier Petitions for Writs of Certiorari should be granted.

Respectfully submitted,

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* * *

CHAP. XXXVII. – *An Act for the Relief of Persons for Damages sustained by Reason of Depredations and Injuries by certain Bands of Sioux Indians.*

Whereas the United States heretofore became bound by treaty stipulations to the Sisseton, Wahpaton, Medawakanton, and Wa[h]pakoota bands of the Dakota or Sioux Indians to pay large sums of money and annuities, the greater portion of which remains unpaid according to the terms of said treaty stipulations; and whereas during the past year the aforesaid bands of Indians made an unprovoked, aggressive, and most savage war upon the United States, and massacred a large number of men, women, and children within the State of Minnesota, and destroyed and damaged a large amount of property, and thereby have forfeited all just claim to the said moneys and annuities to the United States; and whereas it is just and equitable that the persons whose property has been destroyed or damaged by the said Indians, or destroyed or damaged by the troops of the United States in said war, should be indemnified in whole or in part out of the indebtedness and annuities so forfeited as aforesaid: Therefore –

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all treaties heretofore made and entered into by the Sisseton, Wahpaton, Medawakanton, and Wahpakoota bands of Sioux or Dakota Indians, or

any of them, with the United States, are hereby declared to be abrogated and annulled, so far as said treaties or any of them purport to impose any future obligation on the United States, and all lands and rights of occupancy within the State of Minnesota, and all annuities and claims heretofore accorded to said Indians, or any of them, to be forfeited to the United States.

SEC. 2. *And be it further enacted*, That two thirds of the balance remaining unexpended of annuities due and payable to said Indians for the present fiscal year, not exceeding one hundred thousand dollars, being two thirds of the annuities becoming due and payable to said Indians during the next fiscal year, is hereby appropriated, and shall be paid from the Treasury of the United States, out of any moneys not otherwise appropriated, to the commissioners hereinafter provided for, to be apportioned by them among the heads of families, or, in case of their decease, among the surviving members of families of the State of Minnesota who suffered damage by the depredations of the Sisseton, Wahpaton, Medawakanton, and Wa[h]pakoota bands of Sioux or Dakota Indians, or by the troops of the United States in the late Indian war in the State of Minnesota, not exceeding the sum of two hundred dollars to any one family, nor the actual damages aforesaid, and no moneys shall be paid under this section except upon those claims which shall be presented to said commissioners on or before the first day of June next, for the payment of which the said commissioners shall

take and return to the Secretary of the Interior and to the Secretary of the Treasury duplicate vouchers therefor, certified by them.

SEC. 3. *And be it further enacted*, That, for the purpose of making the proper distribution of the moneys hereby appropriated for the present relief of such families, and for the purpose of ascertaining the whole amount of said damages and the persons who have suffered the same, it shall be lawful for the President, by and with the advice and consent of the Senate, to appoint three commissioners, not more than one of whom shall be a resident of Minnesota, who shall take an oath in the manner prescribed by the laws of the United States to faithfully discharge their duties; they shall entertain and hear the complaints (in writing, duly verified on oath) of all and every person aggrieved by the depredations of said Indians, and by the troops of the United States in said war; they shall have power to compel he attendance of witnesses, and to administer the proper oaths to them to testify the truth; they shall have power to compel the claimants to be examined and cross-examined on oath, to be administered by them, as to their said claim; they shall hold their sessions at such times and places as will give the persons complaining the fairest opportunity of verifying their claim with the least expense; they shall take care that no unjust or fictitious claim shall be established; and if they have any reason to suppose that any such claim is presented, they shall have power, and it shall be their duty, to procure any countervailing proof, to

their knowledge, that the same may be finally rejected. The testimony of the witnesses and the examination of the complainant shall be reduced to writing, signed and certified by them, respectively, and shall, with the petition and all the papers relating to each case, with the finding of the commission, be transmitted to the Secretary of the Interior for his approval, rejection, or modification, to be by him laid before the next Congress. A majority of the commission may select their presiding officer, and shall be competent to decide all questions arising before them.

SEC. 4. *And be it further enacted*, That said commissioner shall hold their first session at Saint Peter's, in the State of Minnesota, on or before the first day of April next, for the hearing of claimants, and that all claims must be presented to said commissioners on or before the first day of September next, or the same shall not be heard by them; and the said commissioners shall make and return their finding, and all the papers relating thereto, on or before the first day of December next.

SEC. 5. *And be it further enacted*, That said commissioners shall receive for their services and expenses the sum of two thousand five hundred dollars each. And they are authorized to depute a proper person to summon witnesses, who shall be entitled to receive his actual expenses, to be allowed by said commissioners, and the sum of three dollars per day for his services. Witnesses subpoenaed in behalf of the United States shall receive pay for

attendance, not to exceed the fees allowed by the laws of Minnesota for witnesses attending justices' courts. And, for paying the expenses of said commission, the further sum of ten thousand dollars is hereby appropriated out of the said annuities in the Treasury of the United States, or so much thereof as may be necessary to pay the same.

SEC. 6. *And be it further enacted*, That the Secretary of the Interior, immediately after the passage of this act, shall cause the same to be published in four of the newspapers of the State of Minnesota which, in his opinion, will give the most publicity to the same among the people who have suffered by said depredations, and give notice of the first meeting of said commissioners, the expenses to be paid out of the sum appropriated in the next preceding section.

SEC. 7. *And be it further enacted*, That if the complainant, or any witness testifying before said commissioners, shall be guilty of perjury, upon conviction thereof in the proper court of the United States, he shall suffer the pains and penalties prescribed by the laws of the United States for that offence.

SEC. 8. *And be it further enacted*, That the said commissioners may make rules, not inconsistent with this act, prescribing the order and mode of presenting, prosecuting, and proving said claims before them, which rules shall be published in one newspaper in the city of Saint Paul and one in Saint Peter

for at least two weeks prior to the first session of said commission, to be held at Saint Peter as directed in the fourth section of this act, and the expenses of each publication shall be paid out of the fund appropriated in the fifth section of this act.

SEC. 9. *And be it further enacted*, That the Secretary of the Interior is hereby authorized to set apart of the public lands, not otherwise appropriated, eighty acres in severalty to each individual of the before-named bands who exerted himself in rescuing the whites from the late massacre of said Indians. The land so set apart shall not be subject to any tax, forfeiture, or sale, by process of law, and shall not be aliened or devised, except by the consent of the President of the United States, but shall be an inheritance to said Indians and their heirs forever.

SEC. 10. *And be it further enacted*, That said commissioners, before entering upon the discharge of their duties as such, shall give bonds in the usual form to the United States, in the sum of twenty thousand dollars each, with good and sufficient security, to be approved by the Secretary of the Treasury, faithfully to discharge their duties as such, and to account for any money which may come into their hands.

APPROVED, February 16, 1863.

* * *

Chap. CXIX. – *An Act for the Removal of the Sisseton, Wahpaton, Medawakanton, and Wahpakoota Bands of Sioux or Dakota Indians, and for the Disposition of their Lands in Minnesota and Dakota.*

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the President is authorized and hereby directed to assign to and set apart for the Sisseton, Wahpaton, Medawakanton, and Wahpakoota bands of Sioux Indians a tract of unoccupied land outside of the limits of any state, sufficient in extent to enable him to assign to each member of said bands (who are willing to adopt the pursuit of agriculture) eighty acres of good agricultural lands, the same to be well adapted to agricultural purposes.

SEC. 2. *And be it further enacted*, That the several tracts of land within the reservations of the said Indians, shall be surveyed, under the direction of the commissioner of the general land-office, into legal subdivisions to conform to the surveys of the other public lands. And the Secretary of the Interior shall cause each legal subdivision of the said lands to be appraised by discreet persons to be appointed by him for that purpose. And in each instance where there are improvements upon any legal subdivision of said lands, the improvements shall be separately appraised. But no portion of the said lands shall be

subject to preemption, settlement, entry, or location, under any act of Congress, unless the party preempting, settling upon, or locating any portion of said lands shall pay therefor the full appraised value thereof, including the value of the said improvements, under such regulations as hereinafter provided.

SEC. 3. *And be it further enacted,* That after the survey of the said reservations the same shall be open to preemption, entry, and settlement in the same manner as other public lands: *Provided*, That before any person shall be entitled to enter any portion of the said lands by preemption or otherwise, previous to their exposure to sale to the highest bidder, at public outcry, he shall become an actual bona fide settler thereon, and shall conform to all the regulations now provided by law in cases of preemption; and shall pay, within the term of one year from the date of his settlement, the full appraised value of the land, and the improvements thereon, to the land officers of the district where the said lands are situated. And the portions of the said reservations which may not be settled upon, as aforesaid, may be sold at public auction, as other public lands are sold, after which they shall be subject to sale at private entry, as other public lands of the United States, but no portion thereof shall be sold for a sum less than their appraised value, before the first of January, Anno Domini eighteen hundred and sixty-five, nor for a less price than one dollar and twenty-five cents per acre, until otherwise provided for by law.

SEC. 4. *And be it further enacted,* That the money arising from said sale shall be invested by the Secretary of the Interior for the benefit of said Indians in their new homes, in the establishing them in agricultural pursuits: *Provided,* That it shall be lawful for said Secretary to locate any meritorious individual Indian of said bands, who exerted himself to save the lives of the whites in the late massacre, upon said lands on which the improvements are situated, assigning the same to him to the extent of eighty acres, to be held by such tenure as is or may be provided by law: *And provided, further,* That no more than eighty acres shall be awarded to any one Indian, under this or any other act.

SEC. 5. *And be it further enacted,* That the money to be annually appropriated for the benefit of the said Indians shall be expended in such manner as will, in the judgment of the Secretary of the Interior, best advance the said Indians in agricultural and mechanical pursuits, and enable them to sustain themselves without the aid of the government; but no portion of said appropriations shall be paid in money to said Indians. And in such expenditure, said Secretary may make reasonable discrimination in favor of the chiefs who shall be found faithful to the Government of the United States, and efficient in maintaining its authority and the peace of the Indians. Said Indians shall be subject to the laws of the United States, and to the criminal laws of the state or territory in which they may happen to reside. They shall also be subject to such rules and

regulations for their government as the Secretary of the Interior may prescribe; but they shall be incapable of making any valid civil contract with any person other than a native member of their tribe, without the consent of the President. The Secretary of the Interior shall also make reasonable provision for the education of said Indians, according to their capacity and the means at his command.

APPROVED, March 3, 1863.

96TH CONGRESS, 2d Session } HOUSE OF REPRESENTATIVES { REPORT No. 96-1409

PROVIDING THAT CERTAIN LAND OF THE UNITED STATES SHALL BE HELD BY THE UNITED STATES IN TRUST FOR CERTAIN COMMUNITIES OF THE MDEWAKANTON SIOUX IN MINNESOTA

SEPTEMBER 26, 1980 – Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

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Mr. UDALL, from the Committee on Interior and Insular Affairs submitted the following

REPORT

[To accompany H.R. 7147]

[Including the cost estimate of the Congressional Budget Office]

The Committee on Interior and Insular Affairs, to whom was referred the bill (H.R. 7147) to provide that certain land of the United States shall be held by the United States in trust for certain communities of the Mdewakanton Sioux in Minnesota, having considered the same, report favorably thereon with an amendment and recommend than the bill as amended do pass.

The amendment is as follows:

Page 1, line 3, strike all after the enacting clause and insert the following:

That all right, title, and interest of the United States in those lands (including any structures or other improvements of the United States on such lands) which were acquired and are now held by the United States for the use or benefit of certain Mdewakanton Sioux Indians under the Act of June 29, 1888 (25 Stat. 217); The Act of March 2, 1889 (25 Stat. 980); and the Act of August 19, 1890 (26 Stat. 336), are hereby declared to hereafter to be held by the United States –

(1) with respect to the some 258.25 acres of such lands located within Scott County, Minnesota, in trust for the Shakopee Mdewakanton Sioux Community of Minnesota;

(2) with respect to the some 572.5 acres
of such lands located within Redwood County, Minnesota, in trust for the Lower Sioux Indian Community of Minnesota; and

(3) with respect to the some 120 acres of such lands located in Goodhue County, Minnesota, in trust for the Prairie Island Indian Community of Minnesota.

SEC. 2. The Secretary of the Interior shall cause a notice to be published in the Federal Register describing the lands transferred by section 1 of this Act. The lands so transferred are hereby declared to be a part of the reservations of the respective Indian communities for which they are held in trust by the United States.

SEC. 3. Nothing in this Act shall – (1) alter, or require the alteration, of any rights under any contract, lease, or assignment entered into or issued prior to enactment of this Act, or (2) restrict the authorities of the Secretary of the Interior under or with respect to any such contract, lease, or assignment.

PURPOSE

The purpose of H.R. 7147, introduced by Mr. Nolan, is to provide that certain lands now held by the United States for the benefit of certain Mdewakanton Sioux Communities of Minnesota.

BACKGROUND

H.R. 7147 provides that the title of the United States to certain lands held for the benefit of certain Mdewakanton Sioux or their descendants will be held in trust for the three existing tribal entities of the Mdewakanton Sioux.

After the Great Sioux Uprising of 1856, Congress enacted legislation in 1888, 1889, and 1890, authorizing the appropriation of funds to acquire lands for members of the Mdewakanton Sioux tribe who did not participate in such uprising. These lands were acquired for the use of the members of the Mdewakanton Sioux who were living in Minnesota as of 1886 and their descendants.

After the enactment of the Indian Reorganization Act of 1934, additional lands were acquired in trust for the benefit of the three Mdewakanton groups, who organized under that Act. In order to protect the rights of descendants of those Sioux for whom the 1886 lands were acquired, the constitution and bylaws of the groups established two classes of members: all members of the community who were entitled to the benefits of the tribal lands acquired under the Reorganization Act and members who were descendants of the 1886 Mdewakanton and who had exclusive rights to the benefits of the 1886 lands.

This distinction has severely hampered the tribal efforts to achieve self-determination, as well as effectively barred the Mdewakanton from participation in several Federal programs.

H.R. 7147 would eliminate this distinction by providing that the 1886 lands will be held in trust by the United States for the benefit of the three Mdewakanton communities.

COMMITTEE AMENDMENT

The Committee adopted an amendment in the nature of a substitute proposed by the Department of the Interior. The only substantive changes that amendment makes is (1) to include a 40 acre tract of land which was inadvertently excluded from H.R. 7147 as introduced and (2) to provide that the Secretary of the Interior would publish in the Federal Register an accurate description of the lands to be transferred rather than setting out the legal description in the bill as introduced.

SECTION-BY-SECTION ANALYSIS

Section 1 provides that all right, title and interest of the United States to certain lands which were acquired for the benefit of certain Mdewakanton Sioux pursuant to three Acts of Congress will be held by the United States in trust for the benefit of three Mdewakanton Sioux Communities in Minnesota.

Section 2 provides that the Secretary of the Interior shall cause an accurate description of such lands to be published in the Federal Register and that such lands will be a part of the reservation of the respective Sioux communities.

Section 3 provides that nothing in the Act shall affect any existing rights in the lands being transferred.

COST AND BUDGET ACT COMPLIANCE

Enactment of H.R. 7147 will result in no cost to the United States. The cost analysis prepared by the Congressional Budget Office follows:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, D.C., September 11, 1980.

Hon. MORRIS K. UDALL,
Chairman Committee on Interior and Insular Affairs, U.S. House of Representatives, Longworth House Office Building, Washington, D.C.

DEAR MR. CHAIRMAN: Pursuant to Section 403 of the Congressional Budget Act of 1974, the Congressional Budget Office has reviewed H.R. 7147, a bill to provide that certain land of the United States shall be held by the anited States in trust for certain communities of the Mdewakanton Sioux in Minnesota, as ordered reported by the House Committee on Interior and Insular Affairs, September 10, 1980.

The bill would change the legal status of certain parcels of land currently owned by the United States, to that of land specifically held in trust for the three Sioux communities identified in the bill. This technical change in the status is expected to facilitate community development on the reservations. Based on the review of this bill, it appears that no additional cost to the government would be incurred as a result of enactment of this legislation.

Sincerely,

ALICE M. RIVLIN, *Director*.

INFLATIONARY IMPACT STATEMENT

Enactment of H.R. 7147 will result in no inflationary impact.

OVERSIGHT STATEMENT

No specific oversight activities were undertaken by the Committee with respect to this legislation and no recommendations were submitted to the Committee pursuant to rule X, clause 2(b)2.

COMMITTEE RECOMMENDATION

The Committee on Interior and Insular Affairs, by voice vote, recommends approval of the bill, as amended.

DEPARTMENTAL REPORT

The favorable report of the Department of the Interior, dated September 9, 1980, follows:

U.S. DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SECRETARY,
Washington, D.C., September 9, 1980.

Hon. MORRIS K. UDALL,
Chairman, Committee on Interior and Insular Affairs,
U.S. House of Representatives, Washington, D.C.

Dear MR. CHAIRMAN: This reports to your request for our views on H.R. 7147, a bill "To provide that certain land of the United States shall be held by the United States in trust for certain communities of the Mdewakanton Sioux in Minnesota."

We recommend the adoption of the enclosed amendment to H.R. 7147 in the nature of a substitute and the enactment of the bill as so amended.

H.R. 7147 would declare that all right, title, and interest of the United States in land in Minnesota held by the United States for the use of certain Mdewakanton Sioux Indians under the Acts of June 29 1888 (25 Stat. 217), March 2, 1889 (25 Stat. 980), and August 19, 1890 (26 Stat. 336), shall be held by the United States in trust as follows:

(1) some 258.25 acres of land located in Scott County, all in township 115 north, range 22 west, would be held in trust for the Shakopee Mdewakanton Sioux Community of Minnesota;

(2) some 492.5 acres of land located in Redwood County all in township 112 north, range 35 west, would be held by the United States in trust for the Lower Sioux Indian Community of Minnesota; and

(3) some 120 acres of land located in Goodhue County in township 114 north, range 15 west, would be held by the United States in trust

for the Prairie Island Indian Community of Minnesota.

Land held in trust for each community under the bill would be a part of the reservation of such community. The bill would not affect any contract, lease, or assignment with respect to the land involved which is in existence on the date of the enactment of the bill. We note that the bill fails to include in the description of the land located in Redwood County two 40-acre tracts in section 2 of township 112 north, range 35 west, which should be so included – (1) the southwest quarter northeast quarter and (2) the northwest quarter southeast quarter.

In 1888, the Department of the Interior requested the appropriation of "$20,000 for support of the Mdewakanton Band of Sioux Indians in Minnesota." House Ex. Doc. 228, 50th Cong., 1st Sess. The requested provision was added as a floor amendment, proposed by Rep. MacDonald of Minnesota, to an Indian affairs appropriations bill. The sponsor stated that during a Sioux uprising in Minnesota during August 1862, "a few of the [Sioux] remained friendly to the whites and became their trusted allies and defenders and . . . did valuable service in protecting our people and their property and, in saving many lives. . . ." However, under the Act of February 16, 1863, all treaties with the four Sioux Bands involved were "abrogated and annulled, and all the lands, annuities, and claims previously accorded to said Indians were declared to be forfeited to the United States" because of the uprising. "I am

almost ashamed to say it," the sponsor stated, "but the fact is that no exception was made, even in favor of these friendly Indians." Cong. Rec. 2976-2978 (50th Cong., 1st Sess.)

The resulting Act of June 29, 1888, included the provision as follows:

> For the support of the full-blood Indians in Minnesota, belonging to the Mdewakanton Band of Sioux Indians, who have resided in said State since [May 20, 1886], and severed their tribal relations, twenty thousand dollars, to be expended by the Secretary of the Interior in the purchase, in such manner as in his judgment he may deem best, of agricultural implements, cattle, horses, and lands. . . . (25 Stat. at 228-229)

A similar provision was included in the Act of March 2, 1889 (25 Stat. 980). It provided for a $12,000 appropriation, added to the Indian beneficiaries those "who were then [May 20, 1886] engaged in removing to said State and have since resided therein," and specified that $10,000 could be used in the purchase of such lands and items as "may be deemed best in the case of each of these Indians or family thereof." It also provided that if the amounts appropriated under that Act or Act of June 29, 1888, were not expended within the fiscal year for which they were appropriated, they were to remain available for the purposes for which they were appropriated.

The Act of August 19, 1890, included the appropriation of $8,000 for the Minnesota Sioux, utilizing essentially the same language (26 Stat. at 349) as the 1889 Act except that the 1890 Act applied to "mixed blood" as well as full blood Indians and did not contain the provision making the funds available beyond the fiscal year.

The effect of H.R. 7147 would be to change the legal status of the ownership of the lands involved, which are now held by the United States under the Acts described above for the use of those Mdewakanton Sioux Indian individuals who resided in (or were enroute to) the State of Minnesota on May 20, 1886, and for their descendants. Under the bill, as noted above all right, title, and interest in such lands would be declared instead to be held by the United States in trust for three Minnesota Sioux tribal communities.

The Shakopee Mdewakanton Sioux Community is organized under the Indian Reorganization Act of 1934 (48 Stat. 984) and its governing body is the General Council of the members of the community. No lands are now held in trust by the United States for the community. The 258.25 acres which H.R. 7147 would declare held in trust for such community were acquired in three transactions in 1890 and 1891 at a total cost of $4,733. The land has a current value of approximately $774,750 ($3,000 per acre).

The Lower Sioux Indian Community is organized under the Indian Reorganization Act and governed by

its Community Council. Some 872.5 acres of land are now held by the United States in trust for the community. The 572.5 acres (if the bill is amended to include the 80 acres erroneously omitted) that the bill would declare held in trust for such community were acquired in five transactions in 1889 at a total cost of $8,357.22. Their current value is approximately $572,500 ($1,000 per acre).

The Prairie Island Indian Community is also organized under the Indian Reorganization Act and is governed by its Tribal Council. Some 414 acres of land are now held in trust by the United States for the community. The 120 acres which H.R. 7147 would declare held in trust for such community were acquired in a single transaction in 1889 at a cost of $1,560 and have a current value of approximately $180,000 ($1,500 per acre).

It should be noted the current membership of these three communities is not exclusively composed of the class of Mdewakanton Sioux individuals for whose benefit such land is now held by the United States. However, it should also be noted that the cost to the United States of lands purchased under the 1888, 1889, and 1890 Acts was set off against the recovery by the Mdewakanton and Wahpakoota Bands of Sioux Indians in their suit against the United States (57 Ct. Cl. 357 (1922)), the beneficiaries of which included many individuals other than those for whom such land was held by the United States.

In the case of the Lower Sioux and Prairie Island Communities, the land acquired under the 1888, 1889, and 1890 Acts for individuals is interspersed among the land now held in trust for the communities. The result is a checkerboard pattern of land used that severely diminishes the effectiveness of overall land management programs and community development.

With respect to each of the three communities, much of the land that would be affected would be useful for residential or community purposes, which require long-term lease provisions with an encumberable document as loan security. However, such use is not now possible because of the unusual ownership status of the land which, since it requires the Secretary of the Interior to assure the continuing availability of the land for assignment to eligible beneficiaries of the three Acts, effectively prohibits the issuance of long-term leases on it. Further, the land assignments made to those Mdewakanton Sioux individuals eligible under the Acts are not encumberable documents that can be used in securing loans from commercial institutions. The change in the lands' status contemplated by H.R. 7147, to lands held in trust for the three communities, would allow more productive use of the land by eliminating these problems and would enable the communities involved to manage all of their lands more efficiently.

We suggest, in order to avoid the need to include in the bill a detailed land description that is both cumbersome and subject to inadvertent error, that

the enclosed amendment to H.R. 7147 in the nature of a substitute be adopted. The amendment would provide for the publication in the Federal Register of the legal description of the land involved, a method by which any error may be more easily corrected. It also makes minor technical changes in the language of H.R. 7147.

The Office of Management and Budget has advised that there is no objection to the presentation of this report from the standpoint of the Administration's program.

Sincerely,

THOMAS W. FREDERICK,
Assistant Secretary.

Enclosure.

AMENDMENT TO H.R. 7147
IN THE NATURE OF A SUBSTITUTE

Strike out all after the enacting clause and insert in lieu thereof the following:

That all right, title, and interest of the United States in those lands (including any structures or other improvements of the United States on such lands) which were acquired and are now held by the United States for the use or benefit of certain Mdewakanton Sioux Indians under the Act of June 29, 1888 (25 Stat. 217); the Act of March 2, 1889 (25 Stat. 980); and the Act of August 19, 1890 (26 Stat. 336), are

hereby declared to hereafter be held by the United States –

(1) with respect to the some 258.25 acres of such lands located within Scott County, Minnesota, in trust for the Shakopee Mdewakanton Sioux Community of Minnesota;

(2) with respect to the some 572.5 acres of such lands located within Redwood County, Minnesota, in trust for the Lower Sioux Indian Community of Minnesota, and

(3) with respect to the some 120 acres of such lands located in Goodhue County, Minnesota, in trust for the Prairie Island Indian Community of Minnesota.

SEC. 2. The Secretary of the Interior shall cause a notice to be published in the Federal Register describing the lands transferred by section 1 of this Act. The lands so transferred are hereby declared to be a part of the reservations of the respective Indian communities for which they are held in trust by the United States.

SEC. 3. Nothing in this Act shall – (1) alter, or require the alteration of, any rights under any contract, lease, or assignment entered into or issued prior to enactment of this Act, or (2) restrict the authorities of the Secretary of the Interior under or with respect to any such contract, lease, or assignment.

Calendar No. 1178

96TH CONGRESS, *2d Session* } SENATE { REPORT No. 96-1047

PROVIDING THAT CERTAIN LAND OF THE UNITED STATES SHALL BE HELD BY THE UNITED STATES IN TRUST FOR CERTAIN COMMUNITIES OF THE MDEWAKANTON SIOUX IN MINNESOTA

DECEMBER 1 (legislative day, NOVEMBER 20), 1980. – Order to be printed

Mr. MELCHER, from the Select Committee on Indian Affairs, submitted the following

REPORT

[To accompany H.R. 7147]

The Select Committee on Indian Affairs, to which was referred the bill (H.R. 7147) to provide that certain land of the United States shall be held by the United States in trust for certain communities of the Mdewakanton Sioux in Minnesota, having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

PURPOSE

H.R. 7147 provides that three parcels of land totaling approximately 1,000 acres situated in the State of Minnesota which were acquired by the

United States for the use and benefit of the Mdewakanton Sioux Indians under three separate Acts of Congress in the late 1800's shall continue to be held by the United States but in trust for three separate Mdewakanton Sioux communities situated in that State.

The effect of H.R. 7147 would be to change the legal status of the ownership of the lands involved, which are now held by the United States under the Acts described above for the use of those Mdewakanton Sioux Indian individuals who resided in (or were en route to) the State of Minnesota on May 20, 1886, and for their descendants. Under the bill, as noted above, all right, title, and interest in such lands would be declared instead to be held by the United States in trust for three Minnesota Sioux tribal communities. The rights of individuals whom an interest has already been assigned are protected under the provision of Section 3 of the bill.

BACKGROUND AND NEED

After the Great Sioux Uprising of 1856 Congress enacted legislation in 1888, 1889, and 1890 authorizing the appropriation of funds to acquire lands for members of the Mdewakanton Sioux Tribe who did not participate in such uprising. These lands were acquired for the use of the members of the Mdewakanton Sioux who were living in Minnesota as of 1886 and their descendants.

After the enactment of the Indian Reorganization Act of 1934, additional lands were acquired in trust for the benefit of the three Mdewakanton groups who organized under that Act. In order to protect the rights of descendants of those Sioux, for whom the 1886 lands were acquired, the constitution and by-laws of the groups established two classes of members: all members of the community who were entitled to the benefits of the tribal lands acquired under the Reorganization Act and members who were descendants of the 1886 Mdewakanton and who had exclusive rights to the benefits of the 1886 lands.

This distinction has severely hampered the tribal efforts to achieve self-determination, as well as effectively barred the Mdewakanton from participation in several Federal programs. In the case of the Lower Sioux and Prairie Island Communities, the land acquired under the 1888, 1889, and 1890 Acts for individuals is interspersed among the land now held in trust for the communities. The result is a checkerboard pattern of land used that severely diminishes the effectiveness of overall land management programs and community development.

With respect to each of the three communities, much of the land that would be affected would be useful for residential or community purposes, which require long-term lease provisions with an encumberable document as loan security. However, such use is not now, possible because of the unusual ownership status of the land which, since it requires the Secretary of the Interior to assure the continuing

availability of the land for assignment to eligible beneficiaries of the three Acts, effectively prohibits the issuance of long-term leases on it. Further, the land assignments made to those Mdewakanton Sioux individuals eligible under the Acts are not encumberable documents that can be used in securing loans from commercial institutions. The change in the lands' status contemplated by H.R. 7147, to lands held in trust for the three communities, would allow more productive use of the land by eliminating these problems and would enable the communities involved to manage all of their lands more efficiently.

LEGISLATIVE HISTORY

H.R. 7147 was introduced by Representative Nolan of Minnesota and was favorably reported by the House Committee on Interior and Insular Affairs on September 26, 1980. The bill passed the House and was referred to the Senate Select Committee November 19, 1980. There is no comparable Senate bill.

COMMITTEE RECOMMENDATION AND TABULATION OF VOTE

The Select Committee on Indian Affairs, by a poll of its members on December 1, 1980, by unanimous vote recommends that the Senate pass H.R. 7147 without amendment.

COMMITTEE AMENDMENTS

There are no Committee amendments.

SECTION-BY-SECTION ANALYSIS

Section 1 provides that certain lands totaling approximately 1,000 acres situated in the State of Minnesota which were acquired by the United States under three separate Acts of Congress for the use or benefit of certain Mdewakanton Sioux Indians and their descendants are declared to hereafter be held by the United States in trust for three separate Sioux Indian communities. The purpose of this section is to change and clarify the legal status of the lands in question in order to enhance the beneficial use of the lands.

Section 2 provides that the Secretary of the Interior shall publish in the Federal Register a description of the lands involved and provides further that such lands shall be a part of the reservations of the communities for which they are held in trust.

Section 3 provides that noting in this Act shall alter, or require the alteration, of any rights under any contract, lease, or assignment of such lands entered into or issued prior to enactment of this legislation this protects the rights of all persons having a present interest in the lands.

COST AND BUDGETARY CONSIDERATION

The cost estimate for H.R. 7147, as provided by the Congressional Budget Office, is outlined below:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, D.C., December 1, 1980.

Hon. JOHN MELCHER,
Chairman Select Committee on Indian Affairs, U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: Pursuant to Section 403 of the Congressional Budget Act of 1974, the Congressional Budget Office has reviewed H.R. 7147, a bill to provide that certain land of the United States shall be held by the United States in trust for certain communities of the Mdewakanton Sioux in Minnesota, as ordered reported by the Senate Select Committee on Indian Affairs, December 1, 1980.

The bill would change the legal status of certain parcels of land, currently owned by the United States, to that of land specifically held in trust for the three Sioux communities indentified in the bill. This technical change in the status is expected to facilitate community development on the reservations. Based on the review of this bill, it appears that no additional cost to the government would be incurred as a result of enactment of this legislation.

Sincerely,

ALICE M. RIVLIN, *Director*.

REGULATORY IMPACT STATEMENT

Paragraph 6 of rule XXVII of the Standing Rules of the Senate requires each report accompanying a bill to evaluate the regulatory and paperwork impact that would be incurred in carrying out the bill.

The Committee believes that the bill H.R. 7147 will have no regulatory or paperwork impact.

EXECUTIVE COMMUNICATION

The Executive Communication of the Department of the Interior dated November 19, 1979, transmitting departmental views on H.R. 7147 to the House of Representatives, is as follows:

U.S. DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SECRETARY,
Washington, D.C., September 9, 1980.

Hon. MORRIS K. UDALL,
Chairman, Committee on Interior and Insular Affairs,
U.S. House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: your request for our views on H.R. 7147, a bill "To provide that certain land, of the United States shall be held by the United States in trust for certain communities of the Mdewakanton Sioux in Minnesota."

We recommend the adoption of the enclosed amendment to H.R. 7147 in the nature of a substitute and the enactment of the bill as so amended.

H.R. 7147 would declare that all right, title, and interest of the United States in land in Minnesota held by the United States for the use of certain Mdewakanton Sioux Indians under the Acts of June 29 1888 (25 Stat. 217), March 2, 1889 (25 Stat. 980), and August 19, 1890 (26 Stat. 336), shall be held by the United States in trust as follows:

> (1) some 258.25 acres of land located in Scott County, all in township 115 north, range 22 west, would be held in trust for the Shakopee Mdewakanton Sioux Community of Minnesota;
>
> (2) some 492.5 acres of land located in Redwood County all in township 112 north, range 35 west, would be held by the United States in trust for the Lower Sioux Indian Community of Minnesota; and
>
> (3) some 120 acres of land located in Goodhue County in township 114 north, range 15 west, would be held by the United States in trust for the Prairie Island Indian Community of Minnesota.

Land held in trust for each community under the bill would be a part of the reservation of such community. The bill would not affect any contract, lease, or assignment with respect to the lands involved which is in existence on the date of the enactment of the bill. We note that the bill fails to include in the description of the land located in Redwood County two 40-acre tracts in section 2 of township 112 north, range 35 west, which should be so included – (1) the southwest quarter northeast

quarter and (2) the northwest quarter southeast quarter.

In 1888, the Department of the Interior requested the appropriation of "$20,000 for support of the Mdewakanton Band of Sioux Indians in Minnesota." House Ex. Doc. 228, 50th Cong., 1st Sess. The requested provision was added as a floor amendment, proposed by Rep. MacDonald of Minnesota, to an Indian affairs appropriations bill. The sponsor stated that during a Sioux uprising in Minnesota during August 1862, "a few of the [Sioux] remained friendly to the whites and became their trusted allies and defenders and . . . did valuable service in protecting our people and their property, and in saving many lives. . . ." However, under the Act of February 16, 1863, all treaties with the four Sioux Bands involved were "abrogated and annulled, and all the lands, annuities, and claims previously accorded to said Indians were declared to be forfeited to the United States" because of the uprising. "I am almost ashamed to say it," the sponsor stated, "but the fact is that no exception was made, even in favor of these friendly Indians." Cong. Rec. 2976-2978 (50th Cong., 1st Sess.)

The resulting Act of June 29, 1888, included the provision as follows:

> "For the support of the full-blood Indians in Minnesota, belonging to the Mdewakanton Band of Sioux Indians, who have resided in said State since [May 20, 1886], and severed their tribal relations, twenty thousand dollars, to be

> expended by the Secretary of the Interior in the purchase, in such manner as in his judgment he may deem best, of agricultural implements, cattle, horses, and lands . . . " (25 Stat. at 228-229)

A similar provision was included in the Act of March 2, 1889 (25 Stat. 980). It provided for a $12,000 appropriation, added to the Indian beneficiaries those "who were then [May 20, 1886] engaged in removing to said State and have since resided therein," and specified that $10,000 could be used in the purchase of such lands and items as "may be deemed best in the case of each of these Indians or family thereof." It also provided that if the amounts appropriated under that Act or Act of June 29, 1888, were not expended within the fiscal year for which they were appropriated, they were to remain available for the purposes for which they were appropriated.

The Act of August 19, 1890, included the appropriation of 8,000 for the Minnesota Sioux, utilizing essentially the same language (26 Stat. at 349) as the 1889 Act except that the 1890 Act applied to "mixed blood" as well as full blood Indians and did not contain the provision making the funds available beyond the fiscal year.

The effect of H.R. 7147 would be to change the legal status of the ownership of the lands involved, which are now held by the United States under the Acts described above for the use of those Mdewakanton Sioux Indian individuals who resided

in (or were enroute to) the State of Minnesota on May 20, 1886, and for their descendants. Under the bill, as noted above all right title, and interest in such lands would be declared instead to be held by the United States in trust for three Minnesota Sioux tribal communities.

The Shakopee Mdewakanton Sioux Community is organized under the Indian Reorganization Act of 1934 (48 Stat. 984) and its governing body is the General Council of the members of the community. No lands are now held in trust by the United States for the community. The 258.25 acres which H.R. 7147 would declare held in trust for such community were acquired in three transactions in 1890 and 1891 at a total cost of $4,733. The land has a current value of approximately $774,750 ($3,000 per acre).

The Lower Sioux Indian Community is organized under the Indian Reorganization Act and governed by its Community Council. Some 872.5 acres of land are now held by the United States in trust for the community. The 572.5 acres (if the bill is amended to include the 80 acres erroneously omitted) that the bill would declare held in trust for such community were acquired in five transactions in 1889 at a total cost of $8,357.22. Their current value is approximately $572,500 ($1.000 per acre).

The Prairie Island Indian Community is also organized under the Indian Reorganization Act and is governed by its Tribal Council. Some 414 acres of land are now held in trust by the United States for

the community. The 120 acres which H.R. 7147 would declare held in trust for such community were acquired in a single transaction in 1889 at a cost of $1,560 and have a current value of approximately $180,000 ($1,500 per acre).

It should be noted the current membership of these three communities is not exclusively composed of the class of Mdewakanton Sioux individuals for whose benefit such land is now held by the United States. However, it should also be noted that the cost to the United States of lands purchased under the 1888, 1889, and 1890 Acts was set off against the recovery by the Mdewakanton and Wahpakoota Bands of Sioux Indians in their suit against the United States (57 Ct. Cl. 357 (1922)), the beneficiaries of which included many individuals other than those for whom such land was held by the United States.

In the case of the Lower Sioux and Prairie Island Communities, the land acquired under the 1888, 1889, and 1890 Acts for individuals is interspersed among the land now held in trust for the communities. The result is a checkerboard pattern of land used that severely diminishes the effectiveness of overall land management programs and community development.

With respect to each of the three communities, much of the land that would be affected would be useful for residential or community purposes, which

require long-term lease provisions with an encumberable document as loan security. However, such use is not now possible because of the unusual ownership status of the land which, since it requires the Secretary of the Interior to assure the continuing availability of the land for assignment to eligible beneficiaries of the three Acts, effectively prohibits the issuance of long-term leases on it. Further, the land assignments made to those Mdewakanton Sioux individuals eligible under the Acts are not encumberable documents that can be used in securing loans from commercial institutions. The change in the lands' status contemplated by H.R. 7147, to lands held in trust for the three communities, would allow more productive use of the land by eliminating these problems and would enable the communities involved to manage all of their lands more efficiently.

We suggest, in order to avoid the need to include in the bill a detailed land description that is both cumbersome and subject to inadvertent error, that the enclosed amendment to H.R. 7147 in the nature of a substitute be adopted. The amendment would provide for the publication in the Federal Register of the legal description of the land involved, a method by which any error may be more easily corrected. It also makes minor technical changes in the language of H.R. 7147.

The Office of Management and Budget has advised that there is no objection to the presentation of

this report from the standpoint of the administration's program.

THOMAS W. FREDERICK,
Assistant Secretary.

CHANGES IN EXISTING LAW

In compliance with subsection (7) of rule XXVII of the Standing Rules of the Senate, the Committee notes that there are no changes in existing law.

94 STAT. 3262

PUBLIC LAW 96-557 – DEC. 19, 1980

Public Law 96-557
96th Congress

An Act

To provide that certain land of the United States shall be held by the United States in trust for certain communities of the Mdewakanton Sioux in Minnesota.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all right, title, and interest of the United States in those lands (including any structures or other improvements of the United States on such land) which were acquired and are not held by the United States for the use or benefit of certain Mdewakanton Sioux Indians under the Act of June 29, 1888 (25 Stat. 217); the Act of March 2, 1889 (25 Stat. 980); and the Act of August 19, 1890 (26 Stat. 336), are hereby declared to hereafter be held by the United States –

(1) with respect to the some 258.25 acres of such lands located within Scott County, Minnesota, in trust for the Shakopee Mdewakanton Sioux Community of Minnesota;

(2) with respect to the some 572.5 acres of such lands located within Redwood County, Minnesota, in trust for the Lower Sioux Indian Community of Minnesota; and

(3) with respect to the some 120 acres of such lands located in Goodhue County, Minnesota, in trust for the Prairie Island Indian Community of Minnesota.

SEC. 2. The Secretary of the Interior shall cause a notice to be published in the Federal Register describing the lands transferred by section 1 of this Act. The lands so transferred are hereby declared to be a part of the reservations of the respective Indian communities for which they are held in trust by the United States.

SEC. 3. Nothing in this Act shall (1) alter, or require the alteration, of any rights under any contract, lease, or assignment entered into or issued prior to enactment of this Act, or (2) restrict the authorities of the Secretary of the Interior under or with respect to any such contract, lease, or assignment.

Approved December 19, 1980.

Nos. 09-579, 09-580

In The
Supreme Court of the United States

SHELDON PETERS WOLFCHILD, et al.,

Petitioners,

vs.

UNITED STATES, et al.,

Respondents.

HARLEY D. ZEPHIER, SENIOR, et al.,

Petitioners,

vs.

UNITED STATES, et al.,

Respondents.

On Petitions For Writs Of Certiorari To The United States Court Of Appeals For The Federal Circuit

RESPONSE IN SUPPORT OF PETITIONS FOR WRITS OF CERTIORARI

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ISSUES PRESENTED

These Respondents support the Petitions of *Sheldon Peters Wolfchild, et al. v. United States,* Docket No. 09-579 (the "Wolfchild Petition"), and *Harley D. Zephier, Senior, et al. v. United States,* Docket No. 09-580 (the "Zephier Petition") for Writs of Certiorari. Accordingly, the "Issues Presented" and "Questions Presented" in the Wolfchild and Zephier Petitions fully agree with the position of the Respondents and therefore we request the Court to grant the relief requested therein.

LIST OF PARTIES

A list of parties has been provided to the Clerk of Court for the Supreme Court under a separate filing due to the numerous Plaintiff-Respondents represented (in excess of 1400 individuals).

CORPORATE DISCLOSURE STATEMENT

These Plaintiff-Respondents are not and do not represent a nongovernmental corporation.

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OPINION BELOW

This Responsive Brief is submitted by in excess of 1400 plaintiff heirs of the Loyal Mdewakantons ("Plaintiff-Respondents" or "these Respondents") in support of the Petition for Writ of Certiorari of *Sheldon Peters Wolfchild, et al. v. United States*, Docket No. 09-579, and the Petition for Writ of Certiorari of *Harley D. Zephier, Senior, et al. v. United States*, Docket No. 09-580.

These Plaintiff-Respondents accept and support the statements of the "Opinion Below" as referenced in those Petitions.

STATEMENT OF JURISDICTION

These Respondents accept and support the "Statements of Jurisdiction" as set forth in the above-identified Petitions.

STATUTORY PROVISIONS INVOLVED

Pertinent provisions as set forth in the Petition for Writ of Certiorari filed by Sheldon Peters Wolfchild, et al., are incorporated herein as if fully set forth in this Petition.

STATEMENT OF THE CASE

INTRODUCTION

The family groups of Kimball, Cournoyer, French, Robinette, and Wanna would inform the Court that they fully support the Petition for Writ of Certiorari filed by Sheldon Peters Wolfchild, et al., against the United States, and would incorporate said Petition as if fully set out herein.

That the aforesaid group of respondents respectfully request the Court consider the Petition of the Petitioner and grant the relief sought by the Petitioner.

That the aforesaid family groups did not join the Petitioner in their petition as discussions between counsel for the Petitioner and counsel for the aforesaid family groups determined that there may be a potential appearance of a conflict, and if the matter is returned to the Court of Claims for trial on the merits, the groups may have a different belief as to who the class of beneficiaries should include.

Therefore, pursuant to Rule 12(6), the family groups were served notice, they filed a waiver with this Court on November 24, 2009, indicating that they desired to be a part of the action and considered for relief therefrom. The family groups would inform this Court that the Respondents are listed as Plaintiff Intervenors in the underlying action in the Court of Claims.

FACTUAL BACKGROUND

The above family groups would again support and incorporate as if fully set out herein, the Factual Background set forth in the Petition for Writ of Certiorari filed by Sheldon Peters Wolfchild, et al. against the United States.

RESPONSE FOR GRANTING PETITIONS

As expressed in the Petition for Writ of Certiorari filed for and on behalf of Sheldon Peters Wolfchild, et al., the above family groups support the responses stated in their Petition.

CONCLUSION

The Wolfchild and Zephier Petitions for Writs of Certiorari should be granted, and The Family Groups of Kimball, Cournoyer, French, Robinette, and Wanna concur with all matters set forth in the Writ of Certiorari filed by Erick G. Kaardal.

Respectfully submitted,

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Nos. 09-579, 09-580

Supreme Court, U.S.
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In The
Supreme Court of the United States

SHELDON PETERS WOLFCHILD, et al.,

Petitioners,

vs.

UNITED STATES, et al.,

Respondents.

HARLEY D. ZEPHIER, SR., et al.,

Petitioners,

vs.

UNITED STATES, et al.,

Respondents.

On Petitions For Writs Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF RESPONDENTS IN SUPPORT OF PETITIONS FOR WRITS OF CERTIORARI

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ISSUES PRESENTED

These Respondents support the Petitions of *Sheldon Peters Wolfchild, et al. v. United States, et al.*, Docket No. 09-579 (the "*Wolfchild* Petition"), and *Harley D. Zephier, Sr., et al. v. United States, et al.*, Docket No. 09-580 (the "*Zephier* Petition") for Writs of Certiorari. Accordingly, the following "Statement of Issues Presented" derives from the "Questions Presented" raised in the *Wolfchild* and *Zephier* Petitions. Respondents hereby join in both the *Wolfchild* and the *Zephier* Petitions and adopt by reference, herein, the entirety of said Petitions and supporting material.

This case presents three issues which are of fundamental importance in Indian jurisprudence, and upon which the Federal Circuit's decision departs from the established precedent of this Court and of other Federal Courts:

1. Did the Appropriations Acts of 1888, 1889, and 1890 create a trust for the benefit of the 1886 Mdewakanton Sioux and their descendents (the "1986 Mdewakanton Sioux")?

2. By the passage of the 1980 Act, did Congress intend to terminate that trust?

3. If Congress did so intend, did the termination of the trust constitute a "taking" without just compensation in violation of the Fifth Amendment of the United States Constitution?

LIST OF PARTIES

A list of parties is attached hereto as Appendix C.

CORPORATE DISCLOSURE STATEMENT

These Plaintiffs-Respondents are not and do not represent a nongovernmental corporation.

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OPINION BELOW

This Responsive Brief is submitted by 88 plaintiff heirs of the Loyal Mdewakantons ("Plaintiff-Respondents" or "these Respondents") in support of the Petition for Writ of Certiorari of *Sheldon Peters Wolfchild, et al. v. United States, et al.*, Docket No. 09-579, and the Petition for Writ of Certiorari of *Harley D. Zephier, Sr., et al. v. United States, et al.*, Docket No. 09-580. Respondents hereby join in the Petitions and in all of the arguments made by said Petitions.

These Plaintiff-Respondents accept and support the statements of the "Opinion Below" as referenced in those Petitions.

STATEMENT OF JURISDICTION

These Respondents accept and support the "Statements of Jurisdiction" as set forth in the above-identified Petitions.

STATUTORY PROVISIONS INVOLVED

Pertinent provisions of the February 16, 1863 Act, 12 Stat. 654, Preamble in §§ 1 through 9; March 3, 1863 Act, 12 Stat. 819, Preamble in §§ 1 through 6; 1888, 1889 and 1890 Appropriation Acts: Act of June 29, 1888, 25 Stat. 217 at 228; Act of March 2, 1889, 25 Stat. 980 at 992; Act of August 19, 1890, 26 Stat. 336 at 349; relevant provisions of the original Indian

Reorganization Act of 1934, as amended, 25 U.S.C. § 462, 463, 465 and 479, Indian Reorganization Act of 1934 (as reprinted in *Wolfchild* Petition Appendix at 159-160); and the Act of December 1980, Pub. L. 9-557, 94 Stat. 3262.

STATEMENT OF THE CASE

INTRODUCTION

This case involves the misapplication of settled principles of Indian trust law by the Federal Circuit, resulting in the "taking" of approximately one thousand acres of prime land, which, because of the institution of Indian gaming, is worth millions of dollars in annual revenues, from the descendents of the loyal Mdewakanton Sioux Indian people who risked their lives, and forfeited their property and tribal relationships, to save whites during the Sioux Uprising of 1862 in Minnesota.

FACTUAL BACKGROUND

The Appropriation Acts[1] were intended to compensate those Mdewakanton Sioux who risked their lives to rescue whites during the Minnesota Uprising of 1862, and who thereby completely alienated themselves from their own Sioux tribal communities and were left to fend for themselves in a white man's

[1] *Wolfchild* Petition, App. 154-156.

culture. During the Uprising of 1862, some of the Sioux had remained loyal to the United States Government. These Sioux people were not only loyal to the Government, but they risked their lives by rescuing white settlers. By these acts of courage, they lost not only their homes and property, but they severed their relationships with their own people. Congress recognized that, if they returned to their own tribes, they would be slaughtered. Recognizing their great sacrifice, in 1863, in the same legislation in which it abrogated the Sioux treaties, forfeited the Sioux reservations and terminated their annuities, Congress authorized the Department of the Interior to set apart up to eighty acres of public lands for each of the loyal Mdewakanton Sioux, to be set apart, or allotted, to each of the loyal Sioux "and their heirs forever." It further provided that the land " . . . shall not be subject to any tax, forfeiture, or sale, by process of law, and shall not be alienated or devised, except by the consent of the President."[2] When, by 1888, the Secretary had not allocated those acreages, and recognizing that, when it forfeited the treaties and annuities, Congress had rendered the loyal Mdewakanton Sioux homeless and penniless, Congress, in the Appropriation Acts, appropriated funds and required the Secretary to use those funds to buy land, cattle, horses and implements for the loyal Mdewakanton Sioux. What is especially significant for our case, Congress mandated that each loyal

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[2] 12 Stat. 652, *Wolfchild* Petition, App. 8.

Mdewakanton Sioux was to receive as close to an equal benefit from the land as practicable. To further insure that the loyal Mdewakanton Sioux would benefit from this appropriation, to further demonstrate Congress's intent to benefit all of the loyal Mdewakanton Sioux, and to guard against the inaction of the Department of Interior, Congress mandated that the money be used to support both full and half blooded Indians, and that the funds carry over from year to year, if they were not all spent in the fiscal year in which they were appropriated. The Appropriation Acts were enacted to provide a substitute for the benefits which the 1886 Mdewakanton Sioux lost because they have give up their "vested" tribal status, which is a significant factor, in light of the fact that the Federal Circuit held that they had no "vested" interest in the lands purchased with those appropriations.

REASONS FOR GRANTING PETITIONS

As expressed in the Petitioners' arguments, in which these Respondents join, and supported by the following Respondents' arguments, in order to reach its result the Federal Circuit Court of Appeals misapplied the precedent of this and other Federal Courts as follows:

(1) The Federal Circuit departed from the precedent of this Court, and other Federal Courts, in holding that the Authorization Acts did not create a trust

relationship, and did not confer upon the 1886 Mdewakanton Sioux, as a collective group, a vested right to share in the benefits of the 1886 Lands, thereby depriving the 1886 Mdewakanton Sioux of a remedy for a deprivation of their statutorily conferred rights.

(2) The Federal Circuit's conclusion that it was the intention of Congress, by passage of the 1980 Act, to terminate the existing trust, and to thereby divest ninety percent (90%) of the descendents of the 1886 Mdewakanton Sioux of their interest in the 1886 Lands, was clearly in error, and ignored long-standing Indian treaty and trust law.

(3) If it was the intention of Congress, by the passage of the 1980 Act, to terminate the existing trust, the termination of the trust, and the divestiture of ninety percent of the descendents of the 1886 Mdewakanton Sioux of their interest in the 1886 Lands, under the established standards of the Court, constituted a taking without just compensation in violation of the Fifth Amendment of the United States Constitution.

These Respondents therefore support Petitioners' prayer for review and reversal of the Federal Circuit's opinion, as argued more fully below.

I. The Federal Circuit Departed from the Precedent of this Court, and other Federal Courts, in Holding that the Authorization Acts Did Not Create a Trust Relationship, and Did Not Confer Upon the 1886 Mdewakanton Sioux, as a Collective Group, a Vested Right to Share in the Benefits of the 1886 Lands, thereby Depriving the 1886 Mdewakanton Sioux of a Remedy for a Deprivation of their Statutorily Conferred Rights.

The decision of the Federal Circuit erroneously applied the principles established by the decisions of this Court and of the various Circuits relating to the creation of statutory trusts for Native American people, thus creating confusion in that area of the law, and depriving the 1886 Mdewakanton Sioux of a vested statutory benefit, worth billions of dollars, without any compensation.

To determine Congressional intent, the Authorization Acts must be analyzed in historical context. The Federal Circuit failed to properly undertake that analysis. As a result, the Federal Circuit ignored the intent of Congress, made apparent over the course of many years, to do justice to the 1886 Mdewakanton Sioux and their descendents.

Those Acts were intended to compensate those Mdewakanton Sioux, and their descendents, who risked their lives to rescue whites during the Uprising of 1862, and who thereby completely alienated themselves from their own Sioux tribal communities

and were left to fend for themselves in a white man's culture. They were intended as a substitute for the benefits they lost by forfeiting their tribal status. By these acts of courage, they lost not only their homes and property, but they severed their relationships with their own people. Congress recognized that, if they returned to their own tribes, they would be slaughtered. Recognizing their great sacrifice, in 1863, in the same legislation in which it abrogated the Sioux treaties, forfeited the Sioux reservations and terminated their annuities, Congress authorized the Department of the Interior to set apart up to eighty acres of public lands for each of the loyal Mdewakanton Sioux, to be set apart, or allotted, to each of the loyal Sioux "and their heirs forever."[3] This obviously demonstrates an intention to benefit the loyal Mdewakanton Sioux with the fruits of allotted land, on a permanent basis, accruing to their descendents "and their heirs forever." It further provided that the land " . . . shall not be subject to any tax, forfeiture, or sale, by process of law, and shall not be alienated or devised, except by the consent of the President." This demonstrates an intention to create a trust relationship, to protect the loyal Mdewakanton Sioux from those who would take advantage of them. When, by 1888, the Secretary had not allocated those acreages, and recognizing that, when it forfeited the treaties and annuities, Congress had rendered the loyal Mdewakanton Sioux homeless

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[3] 12 Stat. 652, *Wolfchild* Petition, App. 8.

and penniless, Congress appropriated funds, and required the Secretary to use those funds, to buy land, cattle, horses and implements for the benefit of the loyal Mdewakanton Sioux.[4] The Federal Circuit failed to read the Appropriation Acts in the context of their legislative precursor, the 1863 Bill. What is especially significant for our case, Congress, in the Appropriation Acts, mandated that each loyal Mdewakanton Sioux was to receive as close to an equal amount, in value, from this appropriation, as practicable. Congress thereby clearly expressed its intention that the Department use the land, or manage the land, for the equal, collective benefit of all the loyal Mdewakanton Sioux, which is as clear an invocation of trust status as possible, without the express use of the term "trust." To further insure that the loyal Mdewakanton Sioux would benefit from this appropriation, and further demonstrating Congress's intent to benefit all of the loyal Mdewakanton Sioux, and to guard against the inaction of the Department of Interior, Congress mandated that the money be used to support both full and half blooded Indians, and that the funds carry over from year to year, if they were not all spent in the fiscal year in which they were appropriated. The Appropriation Acts were enacted to provide a substitute for the benefits which the 1886 Mdewakanton Sioux lost because they gave up their tribal status to rescue whites – as a substitute for

[4] *Wolfchild* Petition, App. 154-156.

tribal "trust" status, carrying all of its benefits and protections.

The Federal Circuit's conclusion that "nothing in the legislative history of the three provisions at issue . . . indicates that they were designed to create a trust relationship . . . " is thus simply erroneous. As indicated, the acknowledged precursor of the Appropriation Acts was the 1863 Bill. In fact, the Appropriation Acts were enacted, in part, to remedy the failure of the Secretary of the Interior to set apart the lands called for by the 1863 Bill. This was certainly an important part of the legislative history of the Appropriation Acts. That precursor Bill specifically protected that land against alienation and encumbrance, and provided that the land " . . . shall be an inheritance to said Indians and their heirs forever." The intent of Congress, in passing the Appropriation Acts, certainly must be analyzed in the context of this precursor Bill, a Bill which was not implemented by the Department, and which non-implementation the Appropriation Acts were intended to correct. Had the Secretary purchased the land, pursuant to the 1863 Bill, as the Secretary did, pursuant to the Appropriation Acts, it certainly cannot be questioned that it was the clear intention of Congress to create a trust by the 1863 Bill, even though neither of the Bills explicitly refer to a "trust."

Further, in 1886, Congress again appropriated funds for the purchase of lands for the loyal Mdewakanton Sioux. The Secretary purchased lands and transferred those lands outright to various loyal

Mdewakanton Sioux in fee simple ownership. The Department discontinued that process, when the loyal Mdewakanton Sioux sold or abandoned their lands. This led to the Appropriation Acts.[5] This history supports the conclusion that Congress intended to create what is referred to in the general practice of law as a "spendthrift" trust, one that is designed to be protected from alienation or encumbrance, and to continue to be held for many years for the benefit of the beneficiaries.

There is no question that the Appropriation Acts expressly contained all of the elements of a trust created for the benefit of the 1886 Mdewakanton Sioux. A trust arises out of the nature of the relationships created by the Acts. The Acts authorized the Secretary of the Interior to purchase lands, and mandated that the Department of the Interior use the lands for the benefit of the 1886 Mdewakanton Sioux. That is the classic language for the creation of a trust relationship, the beneficiaries of which were the collective group known as the 1886 Mdewakanton Sioux. However, Congress went even further. It also required that the Department of the Interior, to the degree practicable, use (or manage) the land so that all of the 1886 Mdewakanton Sioux would benefit equally from the appropriation used to purchase the land. To argue that these Acts created anything but

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[5] *Wolfchild, et al. v. United States, et al.*, 559 F.3d 1228, 1233 (Fed. Cir. 2009).

an express trust relationship is to ignore the express language used by Congress. To argue that the Acts did not give rise to any substantive rights in the 1886 Mdewakanton Sioux, either individually or as a collective group, is to ignore the consistent mandates of Congress and the consistent rulings of the Courts, which have given Native American people, who have suffered deprivations arising out of treaty and statutory violations, a remedy in the Court of Claims. There can be no question that, had the Secretary, after purchasing the lands, decided to open them up to white settlers, the 1886 Mdewakanton Sioux would have had a cause of action against the Secretary for breach of his obligations created by the Acts. It is clear that the 1886 Mdewakanton Sioux were granted enforceable, substantive rights and they were the beneficiaries of a statutorily created trust.

The fact that the Secretary had the discretion as to "how" to use the purchased land for the benefit of the 1886 Mdewakanton Sioux, the fact that the Secretary was given "minimal direction" as to how to manage the land for their benefit, does not affect the question of "whether" it should be used for that purpose. This is what some courts have referred to as a "bare" or a "limited" trust. It did not provide management instructions for the Secretary. The Secretary had a great deal of discretion as to "how" to manage, or to use, the trust lands for the benefit of the 1886 Mdewakanton Sioux. However, the Secretary did not have any discretion to completely divest the 1886 Mdewakanton Sioux of their interest in the

lands. That is, in essence, what the Government argues to be the effect of the Bill which the Department proposed to Congress in 1980 – that the lands should be taken from 90% of the descendents of the 1886 Mdewakanton Sioux, and given over to 10% of those descendents, as well as to some who were not even descendents of the 1886 Mdewakanton Sioux, a fact which the Department apparently did not reveal to Congress in the process of proposing the legislation.

The concept of the "bare" or "limited" trust was the subject of this Court's decision in the case of *United States v. Mitchell*, 463 U.S. 206, 103 S.Ct. 2961 (1983) ("*Mitchell II*"), which the Federal Circuit did not properly apply. This Court, in *Mitchell II*, held that the General Allotment Act, although it does not contain detailed directives as to management, created a "limited" trust relationship that "prevents improvident alienation of the allotted lands." The Appropriation Acts, to correct prior problems with outright transfer of land arising out of its alienation or destruction, created a limited trust to prevent improvident alienation of the lands allotted to the 1886 Mdewakanton Sioux. For ninety years, the trust arrangement fulfilled the Congressional purpose – it prevented the alienation of the land. Then, in 1980, just at the time when the 1886 Mdewakanton Sioux, because of the Indian Gaming Act, were on the cusp

of realizing some true benefit from the 1886 lands,[6] the very trustee appointed by Congress to protect the 1886 Mdewakanton Sioux from the "improvident alienation" of their lands, the Secretary of the Department of Interior, according to the Government's argument, violated that trust. The Secretary proposed a Bill that "alienated" the land. The Bill divested 90% of the intended beneficiaries of any and all interest in, or benefit from, the 1886 lands. The Bill did not simply call for the "management" of the land, as alleged in *Mitchell II*. It did not simply result in the more equitable allocation of royalty revenues, as in *United States v. Jim*.[7] According to the Government's construction, it resulted in an outright "taking" of a vested right to the benefits of the 1886 lands without just compensation, which, as will be argued hereafter, is in specific violation of the Fifth Amendment of the United States Constitution. *United States v. Sioux Nation of Indians*, 448 U.S. 371, 100 S.Ct. 2716 (1980).

The Federal Circuit decision thus confuses the question of the "existence" of a trust, with the question of the "type of trust" that Congress intended to create. This Court, in *United States v. Mitchell*, 445 U.S. 535, 100 S.Ct. 1349, 63 L.Ed.2d 607 (1980) (*"Mitchell I"*), and *United States v. Mitchell*, 463 U.S. 206, 103 S.Ct. 2961, 77 L.Ed.2d 580 (1983) (*Mitchell II*), and *United States v. White Mountain Apache*

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[6] *Wolfchild, supra*, at 1235.

[7] 409 U.S. 80, 93 S.Ct. 261 (1972).

Tribe, 537 U.S. 465, 123 S.Ct. 1126 (2003), clarified the difference between a "limited" or "bare" trust, and a "conventional" trust, which has all of the hallmarks of a fiduciary relationship. A "bare" trust is one in which the statute gave the United States no "functional obligations", such as managing timber, for the benefit of the beneficiaries. A "bare" trust is one in which, for example, the Department has no managerial responsibilities but which exists merely to "prevent alienation of the land" and to guarantee immunity from state taxes. Because Congress did not assign any "managerial" duties or "directions" to the Department, the Federal Circuit held that the land was not held in trust. However, there was no question that Congress intended a trust, if only a "bare" or a "limited" trust, a trust which exists to prevent the alienation of the land. A "bare" trust is still a trust, imposing a duty upon the trustee to "prevent alienation of the land." In this case, the trustee violated that duty. The trustee "alienated" the land, taking it away from 90% of its intended beneficiaries, and granting an interest in the land to beneficiaries who are not proper beneficiaries of the land.

The Federal Circuit ignores the fact that the Secretary actually purchased land that was to be used for the equal benefit of the 1886 Mdewakanton Sioux. Once the land was purchased, a general "appropriation" provision becomes a "trust" provision. The legal title to that land was in the United States. There was a trust "res" or "corpus." This was not a case where the Secretary was given authority to

expend funds generally for the welfare of the Indians, or to buy only implements, livestock or seed. The Secretary was given the authority to buy land, and if the Secretary exercised that authority and bought land, the statutes created a statutory duty, in the Secretary, to use it for the equal benefit of the 1886 Mdewakanton Sioux. The Secretary had the discretion as to "how" to use that land for the equal benefit of the 1886 Mdewakanton Sioux, but the Secretary did not have the discretion "whether" to use it for their equal benefit. To argue that they had no collective "vested" interest in the land is therefore clearly erroneous.

It is also significant that the Federal Circuit's opinion summarily dismissed the repeated provisions of the Appropriation Acts which expressly mandated that if the Secretary purchased land, the Secretary was required to assure that " . . . all of said money which is to be expended for lands shall be so expended that each of the Indians shall receive, as nearly as practicable, an equal amount in the value of the appropriation." This statutory mandate was basically ignored because there is no way it can be considered as imposing anything other than a fiduciary obligation on the Secretary of the Interior to use the land so that each of the 1886 Mdewakanton Sioux receive an equal benefit from the land. A persuasive argument can be made that, over the years of the application of the statute, the mandate was not carried out. Allowing a small number of 1886 Mdewakanton Sioux to occupy the land certainly cannot be said to provide for the equal benefit of all. In 1980, the

Secretary of the Interior had an opportunity to correct that injustice. The Secretary could have proposed to Congress that the land be granted, in trust, to the three post-1934 tribal communities on the condition they open their membership up to any of the descendents of the 1886 Mdewakanton Sioux who could prove their status as descendents, and on the condition that the income from the 1886 lands not be distributed among members who were not 1886 Mdewakanton Sioux. Because the Secretary did not so propose, and because Congress did not enact such a condition upon the grant, according to the Government's argument, 90% of the 1886 Mdewakanton Sioux were completely deprived of the benefit of the 1886 lands, which Congress had specifically mandated be used and managed for the equal benefit of all 1886 Mdewakanton Sioux.

The Federal Court refers to the "minimal directives" of the Appropriation Acts, in support of a conclusion that there was no intent to create a trust. Whether the directives are "minimal" is irrelevant. The important thing is that the mandate of the Acts is direct, express and unequivocal. The Secretary is to use the lands for the equal benefit of all of the 1886 Mdewakanton Sioux. Repeated in two of the three Appropriation Acts is the requirement that the Secretary, as nearly as practicable, see to it that each of the beneficiaries receives an equal amount in benefit from the lands purchased. As indicated, that

statutory injunction is repeated in both the 1889 and the 1890 Appropriation Acts.[8] They clearly express a congressional intent that, if the Secretary decides to use, or manage, the lands for the collective benefit of the 1886 Mdewakanton Sioux and their descendents, the Secretary must do so in a manner in which they will all share equally in its benefits. If the Secretary had elected to use the land for the collective benefit of the 1886 Mdewakanton Sioux, for example, by renting the land, he was expressly required, by the Appropriation Acts, to distribute those proceeds equally to the beneficiaries, the 1886 Mdewakanton Sioux.

In its effort to support its conclusions, the Federal Circuit attempts to minimize the "duties" created by the Appropriation Acts. As indicated, the Court refers to the "minimal directives" of the Appropriation Acts. In an apparent acknowledgement that the Secretary was given certain mandates with respect to the land purchased, the Federal Circuit refers to them as "statutory use restrictions" rather than fiduciary responsibilities. The Federal Circuit also characterized this as a "change in the identity of the beneficiaries," and held that a change in the identity of the beneficiaries does not constitute a taking.[9] To characterize the exclusion of 90% of the statutorily intended beneficiaries, and the inclusion of a number

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[8] *Wolfchild* Petition, App. 154-156.

[9] *Wolfchild*, *supra*, at 1258.

of beneficiaries who were not authorized by statute, as a "change in identity of the beneficiaries," as argued by the Government, especially in light of the statutory mandate that the beneficiaries be treated equally, simply defies logic. As will be argued hereafter, it was a "taking" completely without compensation.

No matter how the language is parsed, there is no avoiding the conclusion that Congress directed the Secretary to use the land in such a fashion so that each of the 1886 Mdewakanton Sioux receive "an equal amount of value" from the land in question, and that the Secretary violated that mandate.

The Federal Circuit further concludes that these beneficiaries had an "expectation of benefit," but no "vested rights" in the property. It is the position of Petitioners that the 1886 Mdewakanton Sioux, as a collective group, had a "vested" interest in the 1886 lands. There is no question that individual 1886 Mdewakanton Sioux Indians were not vested with ownership, in the sense of a fee simple interest. However, the 1886 Mdewakanton Sioux, as a group, were given a "fixed and immediate right of present or future enjoyment" of the lands. Black's Law Dictionary. As indicated, if the Secretary had decided to open the 1886 lands to white settlers, there is no question that the 1886 Mdewakanton Sioux would have a claim against the Secretary for violation of his statutory duties.

The Federal Circuit misapplied the decision of this Court in *United States v. Jim,* 409 U.S. 80, 93 S.Ct. 261 (1972). The Federal Circuit cited this case for the proposition that "Because that arrangement did not give vested rights to the land to any of the descendants of the 1886 Mdewakantons, Congress was free to alter the ownership status of the land to create trusts for the three communities." In the first place, the Federal Circuit was incorrect in its conclusion that the Appropriation Acts did not give any vested rights to the descendents of the 1886 Mdewakanton Sioux. In Section 1 of the Section-by-Section Analysis of the Act of 1980, Congress declared: " . . . certain lands totaling approximately 1,000 acres situated in the State of Minnesota were acquired by the United States under three separate Acts of Congress for the use and benefit of certain Mdewakanton Sioux Indians and their descendents. . . ."[10] By Congress's own statement, the Appropriation Acts gave a vested interest, as beneficiaries of the statutory trust, to the 1886 Mdewakanton Sioux and their descendents. The Court cited the above case as an example of an "alteration of ownership status of the land" which would not give rise to a cause of action. The case of *United States v. Jim*, however, dealt with a federal statute which amended a previous federal statute. The previous statute provided that a certain percentage of the mineral royalties from tribal land

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[10] Report, App. 1.

should be used for the health and general welfare of the Navajo of a certain county. The amended statute expanded the pool of beneficiaries, so that the royalties would be used to benefit the Navajo on the entire reservation. This is very different from an Act that completely divests 90% of the beneficiaries of the land of any interest in or any benefit from the land, the benefits from which, because of the gambling revenues, are worth a considerable amount of money. The Court, in *United States v. Jim*, specifically pointed out that Congress had not deprived the Navajo of the benefit of the royalties, but had simply reallocated them in a more equitable manner. The Court was careful to qualify its decision: "We intimate no view as to the rights a tribe might have if Congress were to deprive it of the value of mineral royalties generated by tribal lands."[11]

The subsequent words and actions of the Department of the Interior, carrying out the mandates of the Appropriation Acts, up until 1980, further support the conclusion that that the Department thought that Congress had intended a limited trust relationship. As indicated, the very reason the Secretary of the Interior adopted the assignment system was to use the land for the benefit of the 1886 Mdewakanton Sioux without allowing them to alienate or encumber it. The title to the land was held by the United States

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[11] *United States v. Jim*, 409 U.S. 80, fn.3, 93 S.Ct. 261 (1972).

because the Department of the Interior, based upon past experience with granting fee simple title, feared that sale or the destruction of the property if the United States did not remain the legal owner and in control of the use of the property. That is in the nature of a "spendthrift" trust, where the trustee retains legal title in order to protect the beneficiary from his own actions endangering his continued benefit from the land. The Federal Circuit admits that the Interior Department officials repeatedly characterized the 1886 lands as being held in trust.[12] The Department further treated the land as if it were held in trust. When it was necessary sell a parcel of the 1886 lands, the Bill authorizing sale required the written consent of all of the beneficiaries residing in the County. Act of Feb. 25, 1901, 31 Stat. 805, 806. When the land was not under assignment, it was leased, and the proceeds were held in accounts for the benefit of the lineal descendents of the 1886 Mdewakanton Sioux.[13] Even the constitution and bylaws of the three tribal communities recognized the trust status, creating two classes of membership, one of which consisted of the descendants of the 1886 Mdewakanton Sioux "who had exclusive rights to the benefits of the 1886 lands."[14]

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[12] *Wolfchild*, *supra*, at 1241.

[13] Plaintiff's Exhibit 29, at 5-6.

[14] H.R. Rep. No. 96-1409 (1980), App. 2.

II. Whether the Federal Court's Conclusion that it Was the Intention of Congress, by Passage of the 1980 Act, to Terminate the Existing Trust, and to thereby Divest Ninety Percent (90%) of the Descendents of the 1886 Mdewakanton Sioux of their Interest in the 1886 Lands, Was Clearly in Error, and Ignored Long-Standing Indian Treaty and Trust Law.

The Federal Circuit was required to interpret the 1980 Act in a manner that would render its application clearly constitutional. *Edmond v. United States*, 520 U.S. 651, 658, 117 S.Ct. 1573 (1997). As Justice Holmes stated: "A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score." *United States v. Jin Fuey Moy,* 241 U.S. 394, 401, 36 S.Ct. 658, 659, 60 L.Ed. 1061 (1916); *Almendarez-Torres v. United States*, 523 U.S. 224, 238, 118 S.Ct. 1219 (1998).

As will be argued below, the Federal Circuit's interpretation of the 1980 Act results in a "taking" without just compensation, in violation of the Fifth Amendment of the United States Constitution. The question is: can the Act be interpreted in a manner so as to render it constitutional? Petitioner believes that it can.

The Act of 1980 provides:

> " . . . all right, title and interest of the United States in those lands . . . which were

> acquired and are now held by the United States for the use or benefit of certain Mdewakanton Sioux Indians under . . . (the Appropriation Acts), are hereby declared to hereafter be held by the United States – (1) . . . 258.25 acres . . . in trust for the Shakopee Mdewakanton Sioux Community . . . ; (2) . . . 572.5 aces . . . in trust for the Lower Sioux Indian Community . . . ; and (3) . . . 120 acres . . . in trust for the Prairie Island Indian Community. . . ."[15]

It is obvious that the Act does not change the status of the United States as trustee over the 1886 lands. As concluded by the Federal Circuit, 95% of the enrolled members of the three communities are 1886 Mdewakanton Sioux or their descendents, and were thus proper beneficiaries of the Appropriation Acts. The problem is that the enrolled tribal membership of the three tribes excludes 90% of the 1886 Mdewakanton Sioux, a fact of which there is no indication Congress was aware. The question is: can the Act be interpreted to require the United States, as Trustee, to include those 1886 Mdewakanton Sioux, who are excluded from tribal membership in the three tribes, as continuing beneficiaries of the Trust. The Act does not expressly terminate the benefits of those 1886 Mdewakanton Sioux who were not members of those three tribes. Congressional intent to authorize the extinguishment of trust status must

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[15] *Wolfchild* Petition, App. 154-156.

be "plain and unambiguous," *United States ex rel. Hualpai Indians v. Santa Fe Pacific R. Co., supra*, 314 U.S., at 346, 62 S.Ct., at 251 (1941). It either "must be expressed on the face of the Act or be clear from the surrounding circumstances and legislative history. *Mattz v. Arnett*, 412 U.S. 481, 505, 93 S.Ct. 2245, 2258, 37 L.Ed.2d 92 (1973)." *Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana*, 472 U.S. 237, 105 S.Ct. 2587 (1985).

Such intent certainly is not plain and unambiguous in the language of the Act. The Act merely provides that the 1886 lands, which had been held by the United States in trust for the 1886 Mdewakanton Sioux, were to be held in trust for the three tribal communities, 95% of whose members were 1886 Mdewakanton Sioux. It does not state that the interest of the remaining 1886 Mdewakanton Sioux, 90% of the total number of 1886 Mdewakanton Sioux, should be extinguished and terminated. The purpose of the Bill, as stated in the Committee Report, was to eliminate the "checkerboard pattern of land" whereby land assigned to 1886 lands were interspersed with other tribal land, diminishing the effectiveness of overall land management.[16] Further, the 1886 lands were either assigned to the 1886 Mdewakanton Sioux, or had to remain available for assignment by the Department of the Interior. This prevented the encumbering of the land, or the long-term lease of the

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[16] H.R. Rep. No. 96-1409 (1980), App. 2.

land, for the purpose of effective commercial development. Transferring the 1886 lands to the control of the tribes, however, under the overall trusteeship of the United States, would allow the commercial development of the land for the enhanced benefit of the beneficiaries. As stated by the Director of the Office of Management and Budget, this was viewed a "technical change in status ... to facilitate community development on the reservations."[17] In fact, it enabled the Shakopee tribe to develop a very lucrative casino gaming operation on the land. This very beneficial purpose of the legislation, however, can still be accomplished without divesting the 1886 Mdewakanton Sioux of the benefits of the land. It has to do with the unified management of the land, not with the identity of the beneficiaries. As indicated, the United States is the continuing Trustee of those lands. It certainly is not inconsistent with the terms, or the purpose of the Act of 1980, to interpret that Act consistent with the United States Constitution, to afford a continuing beneficial interest in the 1886 lands under the Trusteeship of the United States, to the 1886 Mdewakanton Sioux who are not enrolled members of the tribes and who, in fact, have been purposely excluded from membership in the tribes. See *Smith v. Babbitt*, 100 F.3d 556 (8th Cir. 1996). It would require that some arrangement must be negotiated between the United States, as Trustee, for the benefit of the 1886 Mdewakanton Sioux who are not enrolled

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[17] *Id.*

members of the tribes, and the tribes, as to the amount of net proceeds from the 1886 lands which should be made available for payment by the United States to the 1886 Mdewakanton Sioux who are not enrolled members of the tribes, taking into account multiple factors, including the risk assumed by the tribe in pursuing the development of the property.

III. If Congress Did so Intend, the Termination of the Trust Constituted a "Taking" Without Just Compensation in Violation of the Fifth Amendment of the United States Constitution.

If the 1980 Act is interpreted to divest 90% of the 1886 Mdewakanton Sioux of their interest in the 1886 lands, the Act results in a taking without just compensation, in violation of the Fifth Amendment of the United States Constitution. *United States v. Sioux Nation of Indians*, 448 U.S. 371, 100 S.Ct. 2716 (1980). In *Sioux Nation*, this Court reconciled two seemingly divergent lines of authority pertaining to actions of Congress impacting the property rights of Indian people. One line of authority, exemplified by the early case of *Lone Wolf v. Hitchcock,* 187 U.S. 553, 23 S.Ct. 216, 47 L.Ed. 299 (1903), recognized Congress's paramount power over the property of the Indians, express and implied, by reason of its exercise of guardianship over their interests, even where the Congressional action is not in accord with the strict letter of a treaty. The second line was exemplified by the more recent decision in *Shoshone Tribe v. United*

States, 299 U.S. 476, 57 S.Ct. 244, 81 L.Ed. 360 (1937). In that case, the Court conceded Congress's paramount power over Indian property, but holds, nonetheless, that "[t]he power does not extend so far as to enable the Government 'to give the tribal lands to others, or to appropriate them to its own purposes, without rendering, or assuming an obligation to render, just compensation.'" *Id.*, at 497, 57 S.Ct., at 252 (quoting *United States v. Creek Nation*, 295 U.S. 103, 110, 55 S.Ct. 681, 684, 79 L.Ed. 1331 (1935)).

As previously argued, the Federal Circuit attempts to fit Congress's action, in adopting the 1980 Act, in the former line of cases, involving the mere "management" of the property. The Federal Circuit characterizes the directions of Congress as mere "statutory use restrictions", rather than fiduciary responsibilities. The Federal Circuit also characterized this as a "change in the identity of the beneficiaries", and held that a change in the identity of the beneficiaries does not constitute a taking. As argued, to characterize the exclusion of 90% of the statutorily intended beneficiaries, and the inclusion of a number of beneficiaries who were not authorized by statute, as a "change in identity of the beneficiaries," especially in light of the statutory mandate that the beneficiaries be treated equally, is simply unreasonable. The Federal Circuit cites the case of *United States v. Jim*, 409 U.S. 80, 93 S.Ct. 261 (1972) to support the argument that Congress can "dilute the ownership" of a class of beneficiaries without committing an unconstitutional "taking." Again, to

argue that exclusion of 90% of the intended beneficiaries is a "dilution of ownership" simply defies logic. If the 1980 Act is interpreted as the Federal Circuit interpreted it, it resulted in a "taking" without compensation. The "taking" is especially onerous when one considers the fact the land has proven so valuable as a base for gaming operations, that the enrolled members of the Shakopee tribe, which purposely refused to admit 1886 Mdewakanton Sioux people who were not previously enrolled, to membership in the tribe, each receive a distribution of $400,000 per year from the tribal gaming operations.

CONCLUSION

The *Wolfchild* and *Zephier* Petitions for Writs of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Calendar No. 1178

96TH CONGRESS *2d Session* | SENATE | REPORT No. 96-1047

PROVIDING THAT CERTAIN LAND OF THE UNITED STATES SHALL BE HELD BY THE UNITED STATES IN TRUST FOR CERTAIN COMMUNITIES OF THE MDEWAKANTON SIOUX IN MINNESOTA

DECEMBER 1 (legislative day, NOVEMBER 20), 1980.
Order to be printed

MR. MELCHER, from the Select Committee on Indian Affairs, submitted the following

REPORT

[To accompany H.R. 7147]

The Select Committee on Indian Affairs, to which was referred the bill (H.R. 7147) to provide that certain land of the United States shall be held by the United States in trust for certain communities of the Mdewakanton Sioux in Minnesota, having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

PURPOSE

H.R. 7147 provides that three parcels of land totaling approximately 1,000 acres situated in the

State of Minnesota which were acquired by the United States for the use and benefit of the Mdewakanton Sioux Indians under three separate Acts of Congress in the late 1800's shall continue to be held by the United States but in trust for three separate Mdewakanton Sioux communities situated in that State.

The effect of H.R. 7147 would be to change the legal status of the ownership of the lands involved, which are now held by the United States under the Acts described above for the use of those Mdewakanton Sioux Indian individuals who resided in (or were en route to) the State of Minnesota on May 20, 1886, and for their descendants. Under the bill, as noted above, all right, title, and interest in such lands would be declared instead to be held by the United States in trust for three Minnesota Sioux tribal communities. The rights of individuals whom an interest has already been assigned are protected under the provision of Section 3 of the bill.

BACKGROUND AND NEED

After the Great Sioux Uprising of 1856 Congress enacted legislation in 1888, 1889, and 1890 authorizing the appropriation of funds to acquire lands for members of the Mdewakanton Sioux Tribe who did not participate in such uprising. These lands were acquired for the use of the members of the Mdewakanton Sioux who were living in Minnesota as of 1886 and their descendants.

After the enactment of the Indian Reorganization Act of 1934, additional lands were acquired in trust for the benefit of the three Mdewakanton groups who organized under that Act. In order to protect the rights of descendants of those Sioux, for whom the 1886 lands were acquired, the constitution and by-laws of the groups established two classes of members: all members of the community who were entitled to the benefits of the tribal lands acquired under the Reorganization Act and members who were descendants of the 1886 Mdewakanton and who had exclusive rights to the benefits of the 1886 lands.

This distinction has severely hampered the tribal efforts to achieve self-determination, as well as effectively barred the Mdewakanton from participation in several Federal programs. In the case of the Lower Sioux and Prairie Island Communities, the land acquired under the 1888, 1889, and 1890 Acts for individuals is interspersed among the land now held in trust for the communities. The result is a checkerboard pattern of land used that severely diminishes the effectiveness of overall land management programs and community development.

With respect to each of the three communities, much of the land that would be affected would be useful for residential or community purposes, which require long-term lease provisions with an encumberable document as loan security. However, such use is not now, possible because of the unusual ownership status of the land which, since it requires the Secretary of the Interior to assure the continuing

availability of the land for assignment to eligible beneficiaries of the three Acts, effectively prohibits the issuance of long-term leases on it. Further, the land assignments made to those Mdewakanton Sioux individuals eligible under the Acts are not encumberable documents that can be used in securing loans from commercial institutions. The change in the lands' status contemplated by H.R. 7147, to lands held in trust for the three communities, would allow more productive use of the land by eliminating these problems and would enable the communities involved to manage all of their lands more efficiently.

LEGISLATIVE HISTORY

H.R. 7147 was introduced by Representative Nolan of Minnesota and was favorably reported by the House Committee on Interior and Insular Affairs on September 26, 1980. The bill passed the House and was referred to the Senate Select Committee November 19, 1980. There is no comparable Senate bill.

COMMITTEE RECOMMENDATION AND TABULATION OF VOTE

The Select Committee on Indian Affairs, by a poll of its members on December 1, 1980, by unanimous vote recommends that the Senate pass H.R. 7147 without amendment.

COMMITTEE AMENDMENTS

There are no Committee amendments.

SECTION-BY-SECTION ANALYSIS

Section 1 provides that certain lands totaling approximately 1,000 acres situated in the State of Minnesota which were acquired by the United States under three separate Acts of Congress for the use or benefit of certain Mdewakanton Sioux Indians and their descendants are declared to hereafter be held by the United States in trust for three separate Sioux Indian communities. The purpose of this section is to change and clarify the legal status of the lands in question in order to enhance the beneficial use of the lands.

Section 2 provides that the Secretary of the Interior shall publish in the Federal Register a description of the lands involved and provides further that such lands shall be a part of the reservations of the communities for which they are held in trust.

Section 3 provides that nothing in this Act shall alter, or require the alteration, of any rights under any contract, lease, or assignment of such lands entered into or issued prior to enactment of this legislation this protects the rights of all persons having a present interest in the lands.

COST AND BUDGETARY CONSIDERATION

The cost estimate for H.R. 7147, as provided by the Congressional Budget Office, is outlined below:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, D.C., December 1, 1980.

Hon. JOHN MELCHER,
Chairman Select Committee on Indian Affairs,
US Senate, Washington, D.C.

DEAR MR. CHAIRMAN: Pursuant to Section 403 of the Congressional Budget Act of 1974. the Congressional Budget Office has reviewed H R 7147, a bill to provide that certain land of the United States shall be held by the United States in trust for certain communities of the Mdewakanton Sioux in Minnesota as ordered reported by the Senate Select Committee on Indian Affairs, December 1, 1980.

The bill would change the legal status of certain parcels of land, currently owned by the United States, to that of land specifically held in trust for the three Sioux communities identified in the bill. This technical change in status is expected to facilitate community development on the reservations. Based on the review of this bill, it appears that no additional cost to the government would be incurred as a result of enactment of this legislation.

Sincerely,

ALICE M. RIVLIN, *Director.*

REGULATORY IMPACT STATEMENT

Paragraph 6 of rule XXVII of the Standing Rules of the Senate requires each report accompanying a bill to evaluate the regulatory and paperwork impact that would be incurred in carrying out the bill.

The Committee believes that the bill H.R. 7147 will have no regulatory or paperwork impact.

EXECUTIVE COMMUNICATION

The Executive Communication of the Department of the Interior dated November 19, 1979, transmitting departmental views on H.R. 7147 to the House of Representatives, is as follows:

U.S. DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SECRETARY,
Washington, D.C., September 9, 1980.

Hon. MORRIS K. UDALL,
Chairman, Committee on Interior and Insular Affairs, U.S. House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: your request for our views on H.R. 7147, a bill "To provide that certain land, of the United States shall be held by the United States in trust for certain communities of the Mdewakanton Sioux in Minnesota."

We recommend the adoption of the enclosed amendment to H.R. 7147 in the nature of a substitute and the enactment of the bill as so amended.

H.R. 7147 would declare that all right, title, and interest of the United States in land in Minnesota held by the United States for the use of certain Mdewakanton Sioux Indians under the Acts of June 29 1888 (25 Stat.217), March 2, 1889 (25 Stat. 980) and August 19, 1890 (26 Stat. 336), shall be held by the United States in trust as follows:

(1) some 258.25 acres of land located in Scott County, all in township 115 north, range 22 west, would be held in trust for the Shakopee Mdewakanton Sioux Community of Minnesota;

(2) some 492.5 acres of land located in Redwood County all in township 112 north, range 35 west, would be held by the United States in trust for the Lower Sioux Indian Community of Minnesota; and

(3) some 120 acres of land located in Goodhue County in township 114 north, range 15west, would be held by the United States in trust for the Prairie Island Indian Community of Minnesota.

(4)

Land held in trust for each community under the bill would be a part of the reservation of such community. The bill would not affect any contract lease, or assignment with respect to the lands' involved which is in existence on the date of the enactment of the bill. We note that the bill fails to include in the description of the land located in Redwood County two 40-acre tracts in section 2 of township 112 north, range 35 west, which should be

so included – (1) the southwest quarter northeast quarter and (2) the northwest quarter southeast quarter.

In 1888, the Department of the Interior requested the appropriation of "$20,000 for support of the Mdewakanton Band of Sioux Indians in Minnesota." House Ex. Doc. 228, 50th Cong., 1st Sess. The requested provision was added as a floor amendment, proposed by Rep. MacDonald of Minnesota, to an Indian affairs appropriations bill. The sponsor stated that during a Sioux uprising in Minnesota during August 1862, "a few of the [Sioux] remained friendly to the whites and became their trusted allies and defenders and . . . did valuable service in protecting our people and their property, and in saving many lives. . . ." However, under the Act of February 16, 1863, all treaties with the four Sioux Bands involved were "abrogated and annulled, and all the lands, annuities, and claims previously accorded to said Indians were declared to be forfeited to the United States" because of the uprising. "I am almost ashamed to say it," the sponsor stated, "but the fact is that no exception was made, even in favor of these friendly Indians." Cong. Rec. 2976-2978 (50th Cong., 1st Sess.)

The resulting Act of June 29, 1888, included the provision as follows:

> "For the support of the full-blood Indians in Minnesota, belonging to the Mdewakanton Band of Sioux Indians, who have resided in

> said State since [May 20, 1886], and severed their tribal relations, twenty thousand dollars, to be expended by the Secretary of the Interior in the purchase, in such manner as in his judgment he may deem best, of agricultural implements, cattle, horses, and lands . . . " (25 Stat. at 228-229)

A similar provision was included in the Act of March 2, 1889 (25 Stat. 980). It provided for a $12,000 appropriation, added to the Indian beneficiaries those "who were then [May 20, 1886] engaged in removing to said State and have since resided therein," and specified that $10,000 could be used in the purchase of such lands and items as "may be deemed best in the case of each of these Indians or family thereof." It also provided that if the amounts appropriated under that Act or Act of June 29, 1888, were not expended within the fiscal year for which they were appropriated, they were to remain available for the purposes for which they were appropriated.

The Act of August 19, 1890, included the appropriation of 8,000 for the Minnesota Sioux, utilizing essentially the same language (26 Stat. at 349) as the 1889 Act except that the 1890 Act applied to "mixed blood" as well as full blood Indians and did not contain the provision making the funds available beyond the fiscal year.

The effect of H.R. 7147 would be to change the legal status of the ownership of the lands involved, which are now held by the United States under

the Acts described above for the use of those Mdewakanton Sioux Indian individuals who resided in (or were enroute to) the State of Minnesota on May 20, 1886, and for their descendants. Under the bill, as noted above all right title, and interest in such lands would be declared instead to be held by the United States in trust for three Minnesota Sioux tribal communities.

The Shakopee Mdewakanton Sioux Community is organized under the Indian Reorganization Act of 1934 (48 Stat. 984) and its governing body is the General Council of the members of the community. No lands are now held in trust by the United States for the community. The 258.25 acres which H.R. 7147 would declare held in trust for such community were acquired in three transactions in 1890 and 1891 at a total cost of $4,733. The land has a current value of approximately $774,750 ($3,000 per acre).

The Lower Sioux Indian Community is organized under the Indian Reorganization Act and governed by its Community Council. Some 872.5 acres of land are now held by the United States in trust for the community. The 572.5 acres (if the bill is amended to include the 80 acres erroneously omitted) that the bill would declare held in trust for such community were acquired in five transactions in 1889 at a total cost of $8,357.22. Their current value is approximately $572,500 ($1,000 per acre).

The Prairie Island Indian Community is also organized under the Indian Reorganization Act and is

governed by its Tribal Council. Some 414 acres of land are now held in trust by the United States for the community. The 120 acres which H.R. 7147 would declare held in trust for such community were acquired in a single transaction in 1889 at a cost of $1,560 and have a current value of approximately $180,000 ($1,500 per acre).

It should be noted the current membership of these three communities is not exclusively composed of the class of Mdewakanton Sioux individuals for whose benefit such land is now held by the United States. However, it should also be noted that the cost to the United States of lands purchased under the 1888,1889, and 1890 Acts was set off against the recovery by the Mdewakanton and Wahpakoota Bands of Sioux Indians in their suit against the United States (57 Ct. Cl. 357 (1922)), the beneficiaries of which included many individuals other than those for whom such land was held by the United States.

In the case of the Lower Sioux and Prairie Island Communities, the land acquired under the 1888,1889, and 1890 Acts for individuals is interspersed among the land now held in trust for the communities. The result is a checkerboard pattern of land used that severely diminishes the effectiveness of overall land management programs and community development.

With respect to each of the three communities, much of the land that would be affected would be useful for residential or community purposes, which

require long-term lease provisions with an encumberable document as loan security. However, such use is not now possible because of the unusual ownership status of the land which, since it requires the Secretary of the Interior to assure the continuing availability of the land for assignment to eligible beneficiaries of the three Acts, effectively prohibits the issuance of long-term leases on it. Further, the land assignments made to those Mdewakanton Sioux individuals eligible under the Acts are not encumberable documents that can be used in securing loans from commercial institutions. The change in the lands' status contemplated by H.R. 7147, to lands held in trust for the three communities, would allow more productive use of the land by eliminating these problems and would enable the communities involved to manage all of their lands more efficiently.

We suggest, in order to avoid the need to include in the bill a detailed land description that is both cumbersome and subject to inadvertent error, that the enclosed amendment to H.R. 7147 in the nature of a substitute be adopted. The amendment would provide for the publication in the Federal Register of the legal description of the land involved, a method by which any error may be more easily corrected. It also makes minor technical changes in the language of H.R. 7147.

The Office of Management and Budget has advised that there is no objection to the presentation

of this report from the standpoint of the administration's program.

THOMAS W. FREDERICK,
Assistant Secretary.

CHANGES IN EXISTING LAW

In compliance with subsection (7) of rule XXVII of the Standing Rules of the Senate, the Committee notes that there are no changes in existing law.

APPENDIX B

96TH CONGRESS *2d Session* | HOUSE OF REPRESENTATIVES | REPORT No. 96-1409

PROVIDING THAT CERTAIN LAND OF THE UNITED STATES SHALL BE HELD BY THE UNITED STATES IN TRUST FOR CERTAIN COMMUNITIES OF THE MDEWAKANTON SIOUX IN MINNESOTA

SEPTEMBER 26, 1980 – Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

---

Mr. UDALL, from the Committee on Interior and Insular Affairs submitted the following

REPORT

[To accompany H.R. 7147]

[Including the cost estimate of the Congressional Budget Office]

The Committee on Interior and Insular Affairs, to whom was referred the bill (H.R. 7147) to provide that certain land of the United States shall be held by the United States in trust for certain communities of the Mdewakanton Sioux in Minnesota, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

The amendment is as follows:

Page 1, line 3, strike all after the enacting clause and insert the following:

> That all right, title, and interest of the United States in those lands (including any structures or other improvements of the United States on such lands) which were acquired and are now held by the United States for the use or benefit of certain Mdewakanton Sioux Indians under the Act of June 29, 1888 (25 Stat. 217); The Act of March 2, 1889 (25 Stat. 980); and the Act of August 19, 1890 (26 Stat. 336), are hereby declared to hereafter to be held by the United States –
>
> > (1) with respect to the some 258.25 acres of such lands located within Scott County, Minnesota, in trust for the Shakopee Mdewakanton Sioux Community of Minnesota; and
> >
> > (2) with respect to the some 572.5 acres of such lands located within Redwood County, Minnesota, in trust for the Lower Sioux Indian Community of Minnesota; and
> >
> > (3) with respect to the some 120 acres of such lands located in Goodhue County, Minnesota, in trust for the Prairie Island Indian Community of Minnesota.

SEC. 2. The Secretary of the Interior shall cause a notice to be published in the Federal Register describing the lands transferred by section 1 of this Act. The lands so transferred are hereby declared to be a part of the reservations of the respective Indian communities for which they are held in trust by the United States.

SEC. 3. Nothing in this Act shall (1) alter, or require the alteration, of any rights under any contract, lease, or assignment entered into or issued prior to enactment of this Act, or (2) restrict the authorities of the Secretary of the Interior under or with respect to any such contract, lease, or assignment.

PURPOSE

The purpose of H.R. 7147, introduced by Mr. Nolan, is to provide that certain lands now held by the United States for the benefit of certain Mdewakanton Sioux Communities of Minnesota.

BACKGROUND

H.R. 7147 provides that the title of the United States to certain lands held for the benefit of certain Mdewakanton Sioux or their descendants will be held in trust for the three existing tribal entities of the Mdewakanton Sioux.

After the Great Sioux Uprising of 1856, Congress enacted legislation in 1888, 1889, and 1890, authorizing the appropriation of funds to acquire lands for

members of the Mdewakanton Sioux tribe who did not participate in such uprising. These lands were acquired for the use of the members of the Mdewakanton Sioux who were living in Minnesota as of 1886 and their descendants.

After the enactment of the Indian Reorganization Act of 1934, additional lands were acquired in trust for the benefit of the three Mdewakanton groups, who organized under that Act. In order to protect the rights of descendants of those Sioux for whom the 1886 lands were acquired, the constitution and bylaws of the groups established two classes of members: all members of the community who were entitled to the benefits of the tribal lands acquired under the Reorganization Act and members who were descendants of the 1886 Mdewakanton and who had exclusive rights to the benefits of the 1886 lands.

This distinction has severely hampered the tribal efforts to achieve self-determination, as well as effectively barred the Mdewakanton from participation in several Federal programs.

HR 7147 would eliminate this distinction by providing that the 1886 lands will be held in trust by the United States for the benefit of the three Mdewakanton communities.

APPENDIX C

LIST OF PLAINTIFFS

Marvel Jean DuMarce et al.

DuMarce	Surname	First Name	Middle Name
1	DuMarce	Marvel	Jean
2	Bursheim	Donna	Faye
3	Selvaqe Jr.	Michael	Ira
4	LaBelle	Paige	Reriae
5	Nicolai a.k.a. Nicoloi	Valencia a.k.a. Velencia	Anita
6	Selvage	Ira	Joseph Murphy
7	Selvaqe	Tilrner	Kenneth
8	Selvaqe	Shalaine	Paris Marie
9	Selvaqe	Sabre	Kenneth
10	Selvaqe	Saden	John
11	Farmer	Stevie	Dawn
12	Shepherd	Austin	Blaine
13	Quinn	Tayonna	Felicia Lashae
14	DuMarce	Jarrod	Kenneth
15	Bursheim	Whitney	DeVon
16	White	Kyan	James
17	Farmer	Sara	Louise
18	Farmer	Janiya	Faye
19	Farmer	Gabrielle	Joy
20	Bursheim	Donita	Mae
21	Goodsell Sr.	Jared	Marshall

22	Marlow	Aliyah	Jean
23	Goodsell Jr.	Jared	Marshall
24	Goodsell	Gracie	Lydia
25	Goodsell	Marshall	Jared
26	Goodsell	Jace	Marshall
27	Bursheim Jr.	Kenneth	Duwayne
28	Bursheim	Julian	John
29	Bursheim III	Kenneth	Duwayne
30	Bursheim	Beverly	Jean
31	Bursheim	Keith	Benjamin
32	Bursheim	DeVon	Belle
33	Bursheim	Bailyn	John
34	BraveBull	Belle	Sheldon
35	BraveBull	Corrine	Faith
36	DuMarce	Geraldine	Arlene
37	Marks	Lori	Kim
38	Cochran	Robyn	Rose
39	Jones	R.	Hunter Sage
40	Jackson	Ari	Lashey Selvage
41	Selvage	Aaliyah	Micheala
42	Selvage	Serena	Maxine
43	Goodsell	Teagan	Anthony
44	Bursheim	Jaia	Marie

Vivian Cordelia Youngbear, et al.

Youngbear	Surname	First Name	Middle Name
1	Youngbear	Vivian	Cordelia
2	Bullhead	Fern	Marie
3	Bullhead	Frank	Louis
4	Bull Head	Kenneth	Jacob
5	Bull Head	Rayden	Kade
6	Bull Head	Renzo	Daz
7	Bull Head	Bethany	Jade
8	Bull Head	Meleah	Chante
9	Crow Feather	Carter	Wayne
10	Bull Head	Chaston	Wade
11	Bullhead	Catherine	Cecelia
12	Still Day	Victor	Clarence
13	Stillday	Zyon	Winter
14	StillDay	Christopher	James
15	Still Day	Rosa	Leigh
16	StillDay	Whitley	Jo
17	StillDay	Whitney	Marie
18	Bullhead	Valerie	Margaret
19	Tortalita	Xavier	Quinn
20	Tortalita	Coraetta	Marcelina
21	Tortalita	Cecelia	Marie
22	Young Bear	Dorine	Rae
23	DragsWolf	Noble	James
24	Young Bear	Trivian	Ruth

25	Rodriguez	Lynnell	Francine
26	Nault	Christian	Sage
27	Young Bear	Marva	Ranae
28	Three Stars III	Harry	Paul
29	Three Stars	Ethan	Cole
30	Young Bear	Lynette	Laverne
31	Abbott Half Red	Frank	Coulton
32	Abbott Half Red	Talburt	Joseph
33	Young Bear	Maryetta	Joann
34	Young Bear	Monica	Faith
35	Young Bear	Angela	Rose
36	Garreau	Eva	Rose
37	Garreau	Justin	William
38	Garreau	Jasper	David
39	Young Bear III	David	Kenneth
40	Bull Head	Jazz	Talen
41	Still Day	Ginnivieve	London
42	Lone Bear	Benjamin	Gavyn
43	Lone Bear	Lennox	Marshall
44	Bull Head	Tyler	Blaze

Nos. 09-579 and 09-580

In the Supreme Court of the United States

SHELDON PETERS WOLFCHILD, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

HARLEY D. ZEPHIER, SR., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ELENA KAGAN
Solicitor General
Counsel of Record
IGNACIA S. MORENO
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AARON P. AVILA
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QUESTIONS PRESENTED

1. Whether three appropriations acts passed in 1888, 1889, and 1890 created a trust for the benefit of certain Mdewakanton Sioux and their descendants.

2. If those appropriations acts created such a trust, whether Congress terminated that trust with the enactment of legislation in 1980 that placed the lands purchased with the appropriated funds in trust for three Indian communities.

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In the Supreme Court of the United States

No. 09-579

SHELDON PETERS WOLFCHILD, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

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v.

UNITED STATES OF AMERICA, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-75) is reported at 559 F.3d 1228.[1] The opinion of the Court of Federal Claims (Pet. App. 76-111) is reported at 78 Fed. Cl. 472. Earlier opinions of the Court of Federal Claims are reported at 77 Fed. Cl. 22, 72 Fed. Cl. 511, 68 Fed. Cl. 779, and 62 Fed. Cl. 521.

[1] Unless otherwise noted, all references to "Pet." and "Pet. App." are to the petition and the petition appendix in No. 09-579.

JURISDICTION

The judgment of the court of appeals was entered on March 10, 2009. A petition for rehearing was denied on June 11, 2009 (Pet. App. 112-116). On August 20, 2009, the Chief Justice extended the time within which to file petitions for a writ of certiorari to and including November 6, 2009, and the petitions were filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1862, the Minnesota Sioux revolted against the United States. Pet. App. 6. After the Army suppressed the uprising, Congress annulled all treaties with the Minnesota Sioux and confiscated Sioux lands in the State. Act of Feb. 16, 1863 (1863 Act), ch. 37, § 1, 12 Stat. 652. Some of the Sioux in Minnesota had opposed the revolt. Pet. App. 6-7. Congress permitted those Sioux—known as the "loyal Mdewakantons" because they were affiliated with the Mdewakanton band of the Sioux Tribe—to remain in Minnesota, *id.* at 7-9, and it authorized the Secretary of the Interior to give 80 acres of land "to each individual * * * who exerted himself in rescuing the whites from the late massacre of said Indians," 1863 Act § 9, 12 Stat. 654. The Secretary did not exercise that authority, and the Sioux remaining in Minnesota sank into poverty. Pet. App. 8-9.

In 1888, 1889, and 1890, Congress passed appropriations statutes, each of which included a long series of specifically designated appropriations for the Indian Department, particular Indian Tribes, and other purposes. Act of June 29, 1888 (1888 Appropriations Act), ch. 503, 25 Stat. 217; Act of Mar. 2, 1889 (1889 Appropriations Act), ch. 412, 25 Stat. 980; Act of Aug. 19, 1890

(1890 Appropriations Act), ch. 807, 26 Stat. 336. The appropriated funds included money for the Mdewakanton Sioux in Minnesota. In particular, the 1888 Appropriations Act appropriated $20,000:

> For the support of the full-blood Indians in Minnesota, belonging to the Medawakanton band of Sioux Indians, who have resided in said State since [May 20, 1886], and severed their tribal relations * * * to be expended by the Secretary of the Interior in the purchase, in such manner as in his judgment he may deem best, of agricultural implements, cattle, horses, and lands.

§ 1, 25 Stat. 228-229. In the 1889 Appropriations Act, Congress appropriated $12,000:

> For the support of the full-blood Indians in Minnesota heretofore belonging to the Medawakanton band of Sioux Indians, who have resided in said State since [May 20, 1886], or who were then engaged in removing to said State, and have since resided therein, and have severed their tribal relations * * * to be expended by the Secretary of the Interior * * * [for] the purchase, as in his judgment he may think best, of such lands, agricultural implements, seeds, cattle, horses, food, or clothing as may deemed best in the case of each of these Indians or family thereof.

§ 1, 25 Stat. 992. Finally, the 1890 Appropriations Act appropriated $8,000:

> For the support of the full and mixed blood Indians in Minnesota heretofore belonging to the Medawakanton band of Sioux Indians, who have resided in said State since [May 20, 1886], or who were

> then engaged in removing to said State, and have since resided therein, and have severed their tribal relations, * * * to be expended by the Secretary of the Interior, as in his judgment he may think best, for such lands, agricultural implements, buildings, seeds, cattle, horses, food, or clothing as may be deemed best in the case of each of these Indians or families thereof.

§ 1, 26 Stat. 349.

With the funds appropriated by the Appropriations Acts, the Secretary purchased lands in Minnesota, which have come to be referred to as the "1886 lands" because the funds used to purchase them were appropriated for Indians present in Minnesota in 1886. See H.R. Rep. No. 1409, 96th Cong., 2d Sess. 2 (1980) (*House Report*). Beginning in 1904, the Secretary assigned 1886 lands to individual loyal Mdewakantons through "Indian Land Certificates." See *Cermak* v. *United States*, 478 F.3d 953, 954 (8th Cir. 2007). The certificates "convey[ed] only temporary use and occupancy rights to individual Indians" and did not effect allotments under the General Allotment Act, 25 U.S.C. 348. *Cermak* v. *Babbitt*, 234 F.3d 1356, 1363 (Fed. Cir. 2000), cert. denied, 532 U.S. 1021 (2001).

Under the Indian Reorganization Act (IRA), 25 U.S.C. 461 *et seq.*, three Indian communities—the Lower Sioux Indian Community, the Prairie Island Indian Community, and the Shakopee Mdewakanton Sioux—were formed in the areas where the 1886 lands were located. Lands were acquired in trust for those communities, each of which included descendants of the loyal Mdewakanton who had been assigned Indian Land Certificates for 1886 lands. *House Report* 2, 4; S. Rep. No. 1047, 96th Cong., 2d Sess. 2 (1980) (*Senate Report*).

By 1980, the communities' areas included two types of lands: lands acquired in trust for the federally-recognized communities under the IRA, and 1886 lands assigned to individual loyal Mdewakantons. The communities' bylaws and constitutions "established two classes of members: all members of the community who were entitled to the benefits of the tribal lands acquired under the [IRA] and members who were descendants of the 1886 Mdewakanton and who had exclusive rights to the benefits of the 1886 lands." *House Report* 2. The 1886 lands were interspersed among the land held in trust for the communities, "result[ing] [in] a checkerboard pattern of land use[] that severely diminishe[d] the effectiveness of overall land management programs and community development." *Senate Report* 2.

In 1980, Congress placed the 1886 lands in trust for the three communities to simplify and clarify the status of the lands in the communities and remedy the problems caused by the checkerboard of property interests. Act of Dec. 19, 1980 (1980 Act), Pub. L. No. 96-557, 94 Stat. 3262. The 1980 Act provided:

> [A]ll right, title, and interest of the United States in those lands (including any structures or other improvements of the United States on such lands) which were acquired and are now held by the United States for the use or benefit of certain Mdewakanton Sioux Indians under the [1888, 1889, and 1890 Appropriations Acts], are hereby declared to hereafter be held by the United States * * * in trust for the [respective community].

1980 Act § 1, 94 Stat. 3262. Section 3 of the 1980 Act protected existing assignments: "Nothing in this Act shall (1) alter, or require the alteration, of any rights

under any contract, lease, or assignment entered into or issued prior to enactment of this Act, or (2) restrict the authorities of the Secretary of the Interior under or with respect to any such contract, lease, or assignment." 94 Stat. 3262.

2. Petitioners are individuals who claim to be descendants of the loyal Mdewakanton, and who brought this action in the United States Court of Federal Claims (CFC) seeking damages from the United States. Pet. App. 16. Petitioners argued that the Appropriations Acts created a trust for the loyal Mdewakanton and their lineal descendants that gives them rights to the proceeds of the trust corpus through their status as holders of equitable title to the 1886 lands. *Ibid.* Petitioners assert that the United States breached its trust obligation by failing to ensure that the uses and benefits of the 1886 lands would accrue to the beneficiaries alone and be distributed as equally as practicable among all of the petitioners. *Id.* at 17.

The CFC granted partial summary judgment to petitioners. 62 Fed. Cl. 521. The court held that the Appropriations Acts created a trust relationship between the United States and the loyal Mdewakanton, that the trust relationship extended to the descendants of the loyal Mdewakanton, and that the trust had the effect of bestowing equitable title to the 1886 lands on the beneficiary class. The court reasoned that the Appropriations Acts had "three key features that show the creation of a trust." *Id.* at 541. First, the statutory language directing the Secretary "to expend the appropriated funds for the Mdewakanton 'as in his judgment he may deem best' * * * functionally appoint[ed] the Secretary of the Interior to serve as the trustee." *Ibid.* (quoting 1888 Appropriations Act § 1, 25 Stat. 229) Second, a provision of

the Acts calling for each Indian to receive "an equal amount in value" constituted "a guideline for the trustee." *Ibid.* (quoting 1889 Appropriations Act § 1, 25 Stat. 993). Third, those statutes provided that funds would remain available even if not spent within the fiscal year, thus "aid[ing] in defining the corpus of the trust." *Ibid.*

The CFC also concluded that the 1980 Act did not terminate the trust because it lacked "an explicitly expressed intention by Congress to terminate the trust." 62 Fed. Cl. at 543. The court held that the 1980 Act only transferred the United States' legal title in the 1886 lands, while equitable title remained with the loyal Mdewakanton. *Ibid.* The court acknowledged that its reading created an unusual "trust on a trust," but it left "that possibility and others * * * to exploration in future proceedings." *Id.* at 544 n.13.

3. On a motion by the United States, the CFC entered an order certifying two questions for interlocutory appeal under 28 U.S.C. 1292(d)(2). Pet. App. 76-111. Specifically, the court certified the questions (1) whether the Appropriations Acts created a trust for the benefit of the loyal Mdewakanton and their descendants, and (2) if so, whether the 1980 Act terminated that trust. *Id.* at 96, 107.

4. The court of appeals accepted the interlocutory appeal and reversed and remanded. Pet. App. 1-75.

With respect to the first certified question, the court of appeals concluded that the 1888, 1889, and 1890 Appropriations Acts did not create a trust. Pet. App. 20-35. The court observed that "[t]he simple statutory directives as to the expenditures authorized by the Appropriations Acts do not evidence an intention on Congress's part to create a legal relationship between the Secretary

of the Interior and the 1886 Mdewakantons in which the Secretary was assigned particular duties as trustee and the Mdewakantons were given enforceable rights as trust beneficiaries." *Id.* at 22. Noting that "the surrounding paragraphs of the same statutes, which provide for the support of other groups of Indians, are clearly just appropriation provisions that do not create trust obligations," the court reasoned that "[i]t is difficult to read the paragraphs relating to the 1886 Mdewakantons as creating a trust relationship." *Id.* at 23. The court further determined that "nothing in the legislative history" of the Appropriations Acts "indicates that they were designed to create a trust relationship." *Id.* at 26. The court also held that nothing in the Department of the Interior's implementation of the statutes suggested that Congress intended to create a trust in the Appropriations Acts. *Id.* at 32-48.

The court of appeals went on to address the second certified question, concluding that, even if the Appropriations Acts created a trust, Congress terminated that trust in the 1980 Act. Pet. App. 62-75. Under that statute, the court observed, "the United States' interest in the lands [was] converted into a trust for the three communities" in the area where the 1886 lands were located, "whereby the United States would hold legal title to the lands and each of the three communities would hold equitable title." *Id.* at 62-63. The court explained that "the [1980] Act is difficult to understand only if viewed in the way [petitioners] view it—as intended to preserve equitable title to the disputed lands in the 1886 Mdewakanton descendants." *Id.* at 66-67. Instead, the court held that, "[i]f the [1980] Act is viewed as creating a trust in which legal title is held by the United States and beneficial title is held by the three communities, the

wording of the Act achieves that purpose clearly and simply." *Id.* at 67.

ARGUMENT

The court of appeals correctly held both that the 1888, 1889, and 1890 Appropriations Acts did not create a trust and that, even if those statutes did create a trust, the trust was terminated by the 1980 Act. Either of those holdings provides an independent basis for the judgment below, and neither conflicts with any decision of this Court or any other court of appeals. Further review is not warranted.

1. The court of appeals correctly held that the three Appropriations Acts did not create a trust. Petitioners identify no decision of this Court or any other court of appeals holding to the contrary. Instead, they assert (Pet. 21, 35) that the court of appeals erroneously concluded that the Appropriations Acts did not create a trust because those statutes did not use the words "trust" or "reservation." More generally, petitioners contend (Pet. 32) that the court's analysis conflicts with this Court's "statutory interpretative principles governing Native American trust cases." Such an abstract conflict would not warrant review, and in any event, petitioners' characterization of the decision below is incorrect. As an initial matter, the court of appeals explicitly acknowledged that "a statute need not contain the word 'trust' in order to create a trust relationship," Pet. App. 20, and it nowhere suggested that use of the term "reservation" was a necessary precondition for a trust relationship.

Petitioners' broader criticism of the court of appeals' interpretive approach is similarly flawed. Petitioners rely (Pet. 32-39) on common-law trust principles to argue that the Appropriations Acts created a trust obliga-

tion. But this Court's recent decision in *United States* v. *Navajo Nation*, 129 S. Ct. 1547 (2009), makes clear that analysis of whether there is a trust obligation must begin with an assessment of whether there is a specific right-creating or duty-imposing statutory or regulatory provision. "*If* a plaintiff identifies such a prescription, and *if* that prescription bears the hallmarks of a 'conventional fiduciary relationship,' *then* trust principles * * * could play a role in 'inferring that the trust obligation [is] enforceable by damages.'" *Id.* at 1558 (quoting *United States* v. *White Mountain Apache Tribe*, 537 U.S. 465, 473, 477 (2003)) (brackets in original). Contrary to *Navajo Nation*, petitioners seek to use common-law trust principles to identify the duty-imposing statutory provision and then to infer a conventional fiduciary relationship. As the court of appeals explained, however, the Appropriations Acts did not create a trust or any specific fiduciary obligations. Instead, they were simply ordinary annual appropriations of public funds for the Secretary to expend for the benefit of certain Indians as part of Congress's effort to aid the Mdewakanton in Minnesota following the 1862 uprising. Pet. App. 27.[2]

Petitioners contend that by recognizing that the Appropriations Acts appropriated public funds "subject to a statutory use restriction," the court of appeals necessarily found that the Acts created specific statutory rights for the loyal Mdewakanton and their lineal de-

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[2] Because petitioners fail to identify a specific statutory obligation or duty with the hallmark of a conventional fiduciary relationship, their suggestion (Pet. 33) that the court of appeals erred in failing to apply what they call the "Fair Inference Rule" is incorrect. That rule would come into play, if at all, only at a later stage of the analysis, in determining whether any statutory obligation is enforceable by damages.

scendants. Pet. 21, 33 (quoting Pet. App. 27). To the contrary, the court of appeals explained that the Appropriations Acts' "limited restrictions" on how the Secretary of the Interior was to spend the appropriated funds "are consistent with the kinds of directions that are routinely contained in appropriations statutes dictating that the appropriated funds are to be spent for a particular purpose." Pet. App. 22. And in any event, while the Acts did provide some restriction on how the Secretary may expend the appropriated funds, each statute gave the Secretary considerable discretion: he was to spend the funds "as in his judgment he may deem best," and even the directive that each Indian receive "an equal amount in value" was to be fulfilled only "as far as practicable." 1888 Appropriations Act § 1, 25 Stat. 229; 1889 Appropriations Act § 1, 25 Stat. 993. That broad discretion is inconsistent with the existence of a specific statutory right in, or duty to, the loyal Mdewakanton and their lineal descendants.

Moreover, the group that was to benefit from the appropriated funds—the beneficiaries of the supposed trust—varied in each of the Appropriations Acts. The 1888 statute referred to "full-blood Indians" who had resided in Minnesota since 1886 and had severed their tribal relations. 1888 Appropriations Act § 1, 25 Stat. 228-229. The 1889 statute referred to "full-blood Indians" who had resided in Minnesota since 1886 "or who were then engaged in removing to said State." 1889 Appropriations Act § 1, 25 Stat. 992. And the 1890 statute referred to "full and mixed blood Indians" who had resided in Minnesota since 1886 "or who were then engaged in removing to said State." 1890 Appropriations Act § 1, 26 Stat. 349. The failure of the Acts to specify a definite and consistent group of "beneficiaries" fatally

undermines petitioners' theory that Congress intended to create a trust for the individual loyal Mdewakanton. Similarly, the failure of any of the Acts to mention heirs or descendants is inconsistent with petitioners' theory that the beneficiaries of the supposed trust would include the lineal descendants of the loyal Mdewakanton.[3]

2. Petitioners suggest (Pet. 30-31) that the decision below is inconsistent with this Court's recent decision in *Carcieri* v. *Salazar*, 129 S. Ct. 1058 (2009), but it is not. *Carcieri* addressed the Secretary's authority under the IRA to acquire land and hold it in trust "for the purpose of providing land for Indians." *Id.* at 1060 (quoting 25 U.S.C. 465). Because the IRA defines the term "Indian" to "include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction," this Court concluded that the statute "limits the Secretary's authority to taking land into trust for the purpose of providing land to members of a tribe that was under federal jurisdiction when the IRA was enacted in June 1934." *Id.* at 1060-1061 (quoting 25 U.S.C. 479). As the court of appeals correctly concluded, the Secretary's authority under the IRA is not relevant to the questions raised in this case—whether the Appropri-

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[3] Petitioners assert (Pet. 25) the decision below conflicts with Ninth Circuit decisions "recogniz[ing] that when federal obligations are to be enforced, there exists federal subject matter jurisdiction." But because the court of appeals held that the Appropriations Acts did not create any specific obligation with respect to the loyal Mdewakanton and their lineal descendants, it had no occasion to consider the CFC's jurisdiction to enforce such obligations. For similar reasons, petitioners are incorrect when they suggest (Pet. 24) that the court of appeals held that federal courts lack subject-matter jurisdiction "if Interior's obligations to a definitive class of Indians affect present-day post-1934 IRA non-tribal community governments." The decision below was not based on the purported effect petitioners identify.

ations Acts created a trust and whether, if they did, the 1980 Act terminated any such trust. Pet. App. 53 n.8.

3. In an argument presented for the first time in this Court, petitioners assert (09-580 Pet. 28-31) that a trust was actually created by the 1863 Act, and the Appropriations Acts merely added to that trust's corpus. Petitioners' theory below, by contrast, was that the Appropriations Acts created a trust. See, *e.g.*, Pet. C.A. Br. 4 ("The CFC correctly determined that the Appropriations Acts created a trust and the 1980 Act did not terminate the trust."), *id.* at 26 ("The Appropriations Acts created a trust."). That theory was the basis for the CFC's grant of partial summary judgment, see 62 Fed. Cl. at 541, and it was the question certified for interlocutory appeal, see Pet. App. 96 ("Whether a trust was created in connection with and as a consequence of the 1888, 1889, and 1890 Appropriations Acts"). Because petitioners' argument based on the 1863 Act was neither pressed nor passed upon below, it does not warrant this Court's review. See, *e.g.*, *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005); *Auer* v. *Robbins*, 519 U.S. 452, 464 (1997).

In any event, the argument lacks merit. In the 1863 Act, Congress gave the Secretary discretionary authority to "set apart of the public lands, not otherwise appropriated, eighty acres in severalty to each individual [of the Mdewakanton band] who exerted himself in rescuing the whites" from the 1862 revolt. 1863 Act § 9, 12 Stat. 654. The Secretary never exercised that authority. Pet. App. 8. There is no basis for concluding that the Secretary's unexercised authority to set aside unappropriated public lands created a trust, the corpus of which was then supplemented by the Appropriations Acts 25 years later.

4. The court of appeals also concluded that even if the Appropriations Acts did create a trust, the 1980 Act terminated that trust. Pet. App. 62-75. That holding is correct, and it provides an independent basis for the decision below.

Petitioners argue (Pet. 44-45) that Congress must use plain and unambiguous language when it terminates a trust, and the court of appeals erred in failing to apply that standard to its interpretation of the 1980 Act. That argument is incorrect for two reasons. First, as the court of appeals explained, any trust created by the Appropriations Acts was, "at most, created only by operation of law." Pet. App. 70 & n. 13. Thus, "Congress's failure to include express language of trust termination cannot be regarded as indicative of an intention not to alter the previously legal relationship among the parties." *Ibid.*[4]

Second, even if there were a clear-statement requirement in the context of this case, it would be satisfied by the patent inconsistency between the provisions of the 1980 Act and the continuation of any preexisting trust. The 1980 Act provides for the United States to hold the 1886 lands in trust for the respective communities—specifically, the "Shakopee Mdewakanton Sioux Community of Minnesota," the "Lower Sioux Indian Community

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[4] Notably, the text of the 1980 Act also supports the conclusion that Congress did not view the Appropriations Acts as creating a trust. The 1980 Act refers to the 1886 lands as lands that were then being held "for the use or benefit of"—not "in trust for"—certain Mdewakanton Sioux Indians. § 1, 94 Stat. 3262. The Act then declares that such lands are to be held in "trust" for the three communities. *Ibid.* Congress's use of the word "trust" to describe the new arrangement but not the old one reinforces the conclusion that Congress believed the 1886 lands were not held in trust prior to the 1980 Act.

of Minnesota," and the "Prairie Island Community of Minnesota." 1980 Act § 1, 94 Stat. 3262. The United States cannot simultaneously hold those same lands in trust for the loyal Mdewakanton and their lineal descendants. Under petitioner's construction of the 1980 Act, the statute creates an anomalous "trust on a trust," whereby the 1886 lands are now held by the United States in trust for the communities, who in turn are beneficiaries of that trust as well as trustees for the loyal Mdewakanton and their lineal descendants. Pet. App. 67. Petitioners have identified no other statute under which Congress created such an unusual arrangement. Instead, as the court of appeals observed, the natural conclusion is that Congress intended the 1980 Act to terminate any trust that might have been created by the Appropriations Acts rather than to create (apparently for the first time) a "trust on a trust." *Ibid.*

As the court of appeals explained, that conclusion is reinforced by the 1980 Act's purposes and legislative history. Pet. App. 65-66. In enacting the 1980 Act, Congress was concerned that the 1886 lands and lands subsequently acquired in trust for the communities had created a "checkerboard pattern of land use[] that severely diminishe[d] the effectiveness of overall land management programs and community development," *Senate Report* 2, and it sought to "eliminate this distinction by providing that the 1886 lands will be held in trust by the United States for the benefit of the three Mdewakanton communities," *House Report* 2. Petitioner's interpretation, by creating an unprecedented "trust on a trust,"

would only compound the problem that Congress sought to solve.[5]

5. Finally, petitioners contend (09-580 Pet. 32-42) that the United States should be judicially estopped from arguing in this case that the Appropriations Acts did not create a trust or that the 1980 Act terminated any trust. This Court has never held that judicial estoppel is available against the United States, cf. *OPM* v. *Richmond*, 496 U.S. 414, 419-424 (1990), and this case is not an appropriate vehicle for resolving that question because petitioners have failed to show that the elements of judicial estoppel would be satisfied in any event. In order for judicial estoppel to apply, petitioners must demonstrate, first, that the government's current position is "clearly inconsistent" with its earlier position; second, that the government persuaded a court to accept that earlier position such that judicial acceptance of the government position here would create the perception that a court was misled; and third, that the government's inconsistent positions would give it an unfair advantage or impose an unfair detriment on petitioners. *New Hampshire* v. *Maine*, 532 U.S. 742, 750-751 (2001) (citations omitted). Here, petitioner's argument fails at the first step. As the court of appeals observed in rejecting petitioners' claim of judicial estoppel, there is nothing "said by the government attorneys in the refer-

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[5] Petitioners also suggest (Pet. 43) that this aspect of the decision below is inconsistent with *Carcieri*, which, they say, required the court of appeals to determine "who is the ultimate beneficiary of the 'lands' after the 1980 Act." But as explained above, *Carcieri* concerned the interpretation of the IRA, whereas the disposition of the lands at issue here is governed by the 1980 Act. And Congress unambiguously declared in the 1980 Act that the United States holds the 1886 lands in trust for three Indian communities.

enced cases that would support the [petitioners'] claims in this one." Pet. App. 61.

Petitioners base their judicial-estoppel argument (09-580 Pet. 33-36) on a position they allege the United States took in *Cermak* v. *United States*, 478 F.3d 953 (8th Cir. 2007), and *Cermak* v. *Babbitt*, 234 F.3d 1356 (Fed. Cir. 2000), cert. denied, 532 U.S. 1021 (2001). They assert (09-580 Pet. 33-34) that the United States argued in that litigation that "the 1863 Act and/or the Appropriations Acts created a trust." That is incorrect. To the extent that the United States discussed the lands at issue as having been held in trust for the use of certain individuals, see, *e.g.*, 09-580 Pet. 34-35, it was in the context of the relationship between the United States and a *particular individual* who held land under a specific Indian Land Certificate. The United States did not take the position that the Appropriations Acts created a trust of which the loyal Mdewakanton and their lineal descendants are beneficiaries. Indeed, fundamental to the United States' position in *Cermak* was that no one else, including especially Cermak's heirs, held any rights in the assignment. See, *e.g.*, *Cermak*, 478 F.3d at 957. Thus, the government's position in the two cases is the same.

Petitioners also maintain (09-580 Pet. 35-37) that the United States took the position in *Cermak* that the 1980 Act did not terminate any trust created by the Appropriations Acts. That is similarly incorrect. As is apparent from the quotations in the petition, what the United States said was that, with respect to land held under an Indian Land Certificate at the time of the 1980 Act, Section 3 of the 1980 Act preserved the existing certificate holder's right. The United States' position throughout this case—that the 1980 Act terminated whatever trust

(if any) was created by the Appropriations Acts—is consistent with its position that the 1980 Act did not terminate the interest of an Indian Land Certificate holder in his or her certificate. See Pet. App. 61-62; see also *id.* at 71.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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SHELDON PETERS WOLFCHILD, et al.,

Petitioners,

vs.

UNITED STATES,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

WOLFCHILD PETITIONERS' REPLY BRIEF TO THE BRIEF FOR THE UNITED STATES IN OPPOSITION

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This brief is impelled by the Government's avoidance of Petitioners' arguments.

I. The Solicitor General did not address the conflicts between the Circuits or with the Supreme Court's prior decisions, thus avoiding the *Wolfchild* Petitioners' first question presented.

The Solicitor General's response brief is most notable for what it does not say. It never mentions or cites *Smith v. Babbitt*.[1] The silence is particularly notable because the Petitioner's first question presented is based on the conflicts between *Smith*, the Federal Circuit decision below, *Carcieri*, and the Ninth Circuit decisions.[2] Consistent with this silence, the Solicitor General ignored the *Wolfchild* Petitioners' first question presented without comment.

The Solicitor General's silence on *Smith* only emphasizes the circuit conflicts and its conflicts with *Carcieri*. *Smith* held that the district courts do not have jurisdiction to hear the petitioners' claims against Interior for violations of "IGRA, ICRA, IRA, RICO and the Tribe's Constitution" because Shakopee Mdewakanton Sioux Community is an historical tribe

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[1] 100 F.3d 556 (8th Cir. 1996), *cert. denied sub nom., Feezor v. Babbitt*, 522 U.S. 807 (1997).

[2] *Carcieri v. Salazar*, __ U.S. __, 129 S.Ct. 1058 (Feb. 24, 2009); *United States v. Yakima Tribal Court*, 806 F.2d 853 (9th Cir. 1986); *United States v. White Mountain Apache Tribe*, 784 F.2d 917 (9th Cir. 1986). *See* Pet. 2-5, 21-31.

which can unilaterally determine its members – who receive the benefits from the 1886 lands, the subject of this *Wolfchild* litigation.[3]

The Solicitor General's brief *disagrees* with *Smith* by asserting the communities are administrative creations under the IRA – not historical tribes:

> Under the Indian Reorganization Act (IRA), 25 U.S.C. 461 et seq., three Indian communities – the Lower Sioux Indian Community, the Prairie Island Indian Community, and the Shakopee Mdewakanton Sioux – were formed in the areas where the 1886 lands were located.[4]

The Solicitor General cites no pre-1934 IRA treaty or statute that would make the communities historical tribes. The Opposition affirms the Petitioners' position, citing only the Act of Feb. 16, 1863, 12 Stat. 652, in which "Congress annulled all treaties with the Minnesota Sioux and confiscated Sioux lands in the State."[5]

Thus, the holding of *Smith* cannot be reconciled with the Opposition's brief, the Federal Circuit's "statutory use restriction," nor with the U.S. Court of Federal Claim's "*trust*." *Smith* is also in conflict with

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[3] *Smith*, 100 F.3d at 559.

[4] U.S. Br. 4.

[5] U.S. Br. 2.

Carcieri's holding that Interior is accountable in federal court for violations of the IRA. Yet, *Smith* remains good law.

This Court has primary responsibility among the three branches to resolve conflicts among the Circuits especially in the absence of either a congressional statutory resolution to the conflict or an agency regulatory resolution.[6]

Since the U.S. Court of Federal Claims granted partial summary judgment to the Petitioners in 2004, neither Interior nor Congress has worked toward reconciling the conflicts. This Court should not now defer to the other branches in this case.

II. The Opposition's recitation of the Federal Circuit's decision without analysis to substantiate a denial of the instant Petition begs the question of whether the Appropriation Acts created a trust.

The questions presented here are of undeniable national importance to the interpretation, the interplay and the impact of all laws affecting Indians. With the Federal Circuit's introduction of "statutory use restriction" into the lexicon of Supreme Court

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[6] *Braxton v. U.S.*, 500 U.S. 344, 347-48 (1991). *See Bingler v. Johnson*, 394 U.S. 741, 747-48 (1969) (granting review on circuit conflict over treasury regulation interpretation); *United States v. O'Malley*, 383 U.S. 627, 630 (1966) (because of conflicting circuit decisions, certiorari was granted).

interpretative principles and the legal framework for Native American laws, the court has disrupted and brought into doubt whether federal forums exist for Native Americans to bring claims against the United States. As further evidenced by participating *amici*, the Federal Circuit's decision is troubling with far-reaching implications to future generations of Native Americans, their relationship with the United States, and for possibilities of sustaining United States treaty and statutory obligations to Native Americans. Therefore, the Federal Circuit decision should not be permitted to stand unreviewed.

The Solicitor General's brief glosses over the 1888, 1889, and 1890 Appropriation Acts as "simply ordinary annual appropriations of public funds for the Secretary to expend for the benefit of certain Indians . . . to aid the Mdewakanton in Minnesota following the 1862 uprising."[7] They are hardly "ordinary."

The Opposition's position belies the historic context of the Acts and the contemporaneous government acknowledgement of trust obligations to the Loyal Mdewakanton. The acting Commissioner of the Department of Interior wrote on February 20, 1899:

> As you are doubtless aware, the title to all the land purchased by late Agent Henton for

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[7] U.S. Br. 10 (March 2010).

> *said Indians*, is still vested in the United States – being *held in trust for them*. . . .[8]

"*Said Indians*" refers to the Loyal Mdewakanton. And, as the Area Director wrote in 1976, discussing issues regarding Interior-held trust funds derived from the purchased 1886 lands:

> It is our feeling that we should not attempt to distribute such [trust] funds on the strength of the resolutions from the three communities [Lower Sioux, Prairie Island, and Shakopee Mdewakanton Sioux Communities][9] at this time . . . The land was originally purchased for the Mdewakanton Sioux residing in Minnesota on May 20, 1886, and their descendants. . . .[10]

The referenced trust is extended under 25 U.S.C. §462.

The Solicitor General admits the existence of the "Loyal Mdewakanton" – i.e., the "1886 Mdewakanton." By doing so, the Government acknowledges an historical fact that through the Appropriation Acts, certain specific Indians who became "known as the 'Loyal Mdewakanton' because they *were* affiliated with the Mdewakanton band of the Sioux Tribe."[11]

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[8] Pet. Reply App. 3 (emphasis added).

[9] Post-1934 IRA communities – not historic tribes.

[10] Pet. Reply App. 6.

[11] U.S. Br. 2 (emphasis added).

The Solicitor General correctly used the past tense "were" in identifying this specific group – the "Loyal Mdewakanton." To receive benefits under the Acts demanded the "[severance] of their tribal relations."[12] But, the Solicitor General inexplicably argues that this group of Indians is too unidentifiable and too indefinite to fall within trust principles.[13] The Solicitor General's legal argument is inconsistent with the fact she acknowledges.

The 1863 Act eviscerated the *historical* tribal identity of the Mdewakanton, as well as their lands, and their treaties with the United States. The purported wrongdoers were exiled from Minnesota. Those who remained in Minnesota – those who exerted themselves in saving whites – were the "Loyal Mdewakanton."

With the Appropriation Acts, Congress gave Interior specific instructions to benefit a specific group of people who suffered because of the 1863 Act. As the Solicitor General acknowledges, the Loyal Mdewakanton are the "individual[s] * * * who exerted [themselves] in rescuing whites from the late

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[12] Act of June 29, 1888, ch. 503, 25 Stat. 217 at 228; Act of Mar. 2, 1889, ch. 412, 25 Stat. 980 at 992; Act of Aug. 19, 1890, ch. 807, 26 Stat. 336 at 349; App. 154-55.

[13] U.S. Br. 11-12 (citing no case law).

massacre of said Indians"[14] and who "sank into poverty" in Minnesota.[15]

The Solicitor General's recitation of "selected" excerpts from the Federal Circuit's decision is unpersuasive. Her dismissal of the historical context of the Appropriation Acts as "limited restrictions" of the "kinds of directions that are routinely contained in appropriation acts" is misplaced. While the Solicitor General affirmed that the Acts provided "some restrictions on how the Secretary may expend the appropriated funds," she avoided the historical context and subsequent government control and supervision over acquired lands held "in trust"[16] for "said Indians."[17]

The Solicitor General merely restated the Federal Circuit's decision that the Acts are "inconsistent with the existence of a specific statutory right in, or duty to, the loyal Mdewakanton. . . ."[18] Her approach provides no rationale and is an argument that begs the question of whether the Acts created a trust, providing more reason for review of the Federal Circuit's decision.

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[14] *Id.* 2.

[15] *Id.*

[16] Pet. Reply App. 3.

[17] *Id.*

[18] U.S. Br. 11.

Moreover, the Opposition's approach fails to acknowledge that the Appropriation Acts incorporated a "humane and self-imposed policy" toward the 1886 Mdewakanton. This Court previously recognized important principles to keep in mind when interpreting Native American law:

> Under a humane and self-imposed policy which is found expressly in many acts of Congress and numerous decisions of this Court, it has charged itself with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards.[19]

Contrary to the Solicitor General's contention that this case involves an "abstract conflict" with Supreme Court statutory interpretative principles of Congressional Acts affecting Native Americans,[20] the Federal Circuit precipitates a conflict with other Court decisions and sets new preconditions for statutes of antiquity to establish government obligations toward Native Americans – where previously there has been none.

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[19] *Seminole Nation v. United States,* 316 U.S. 286, 296-97 (1942) (relevant, although expressed in the context of an existing treaty with the Seminole Nation).

[20] *United States v. Mitchell,* 463 U.S. 206, 225 (1983). U.S. Br. 9.

For example, while stating that the "word 'trust'" is unnecessary in a statute to create a trust relationship, the Federal Circuit nevertheless held "the failure to use the term [trust] gives rise to doubt that a trust relationship was intended." This certainly suggests a precondition of *explicit* word usage – here "trust" – to show Congressional intent, a notion not adopted in Supreme Court jurisprudence nor part of the Indian trust law lexicon.

Similarly, the Federal Circuit's innovative phrase "statutory use restriction" is currently not part of Supreme Court jurisprudence nor Indian trust law lexicon.[21] A "statutory use restriction" creates an unsuitable analytical framework as applied to 19th Century statutes. This new legal wrinkle ultimately will allow federal government avoidance of statutory liability to Native Americans – as it has in this case.

Moreover, "statutory use restriction" is a phrase with no meaning for Native Americans. There is no case law, no document in over 100 years of Interior administrative history, where Interior's obligations under the Appropriation Acts to the 1886 Mdewakanton are referred to as "statutory use restrictions."

The new phrase is a judicial creation apparently leaving Native Americans with no forum to litigate against the federal government when post-1934 IRA

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[21] Pet. App. 27 ("[T]he Appropriations Acts are best interpreted as merely appropriating funds subject to a statutory use restriction, and not creating a trust relationship. . . .").

non-tribal community governments are involved. The "statutory use restrictions" create no substantive rights and provide no standing to sue the government. Accordingly, this permits Interior, without federal court review, to take lands and benefits from one statutorily-defined group of Native American beneficiaries and transfer the land and benefits to a post-1934 IRA non-tribal community government which excludes the Congressionally-intended beneficiaries.

Amicus curiae Historic Shingle Springs Miwok find themselves in this very position.[22] Lands once appropriated for the Historic Miwok, were inexplicably given by the federal government to another group of people using the "Miwok" name, but who were not of the Historic Shingle Springs Miwok people. The Federal Circuit decision denies them a federal forum.

III. *Carcieri* is inconsistent with the Federal Circuit's decision and relevant to this case.

The Solicitor General uses a *non sequitur* argument regarding the Federal Circuit holding that this Court's recent decision in *Carcieri v. Salazar* is irrelevant to the Petitioners' presented questions. The Solicitor General argued that the Federal Circuit's decision is "not inconsistent" with the *Carcieri*

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[22] Brief of *Amicus Curie* Historic Shingle Springs Miwok.

holding; later, she asserts that it is irrelevant to the questions presented. First, if *Carcieri* is consistent with the Federal Circuit decision as the Solicitor General argues, then she is wrong because it must be relevant.

Second, and as noted above, the Government did not argue the *Wolfchild* Petitioners' first "question presented" regarding conflicts among the circuits *and* between the circuits and Supreme Court precedents. Petitioners argued that *Carcieri* provided subject matter jurisdiction for Native Americans to challenge federal government statutory violations "presumably even those involving a post-1934 Indian Reorganization Act non-tribal community government."[23]

In the instant case, Petitioners' concern involves the lack of statutory authority for Interior to abrogate its obligations to 1886 Mdewakanton and then transfer them to the post-1983 IRA non-historical, non-tribal communities. This includes the holding of lands in trust for those communities. This fits well within the realm of the *Carcieri* holding that the 1934 IRA "limits the Secretary's authority to taking land into trust for the purpose of providing land to members of a tribe that was under federal jurisdiction when the IRA was enacted in June 1934."[24]

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[23] Pet. 30.

[24] *Carcieri*, 129 S. Ct. at 1060-61; U.S. Br. 12.

IV. The reliance on a "natural conclusion" to terminate a trust conflicts with *Passamaquoddy* when, from 1936 to 1980, Interior acted on its fiduciary duties to individual Loyal Mdewakanton while the Communities were recognized.

Prior to the Federal Circuit decision, the First Circuit's *Passamaquoddy*[25] case required that Congressional statutes be "plain and unambiguous" to terminate Indian trusts. Despite this, the Opposition argues if the statutory text of the 1980 Act yields a "natural conclusion" of trust termination, it is enough.

Because of the "extraordinarily poor drafting reflect[ed] in the 1980 Act,"[26] legislative history also played a role in the decisions below. But, like the Federal Circuit, the Opposition ignores the IRA and the administrative period from 1936 through 1980. Despite no explicit trust termination language, the Solicitor General finds (as did the Federal Circuit) that the 1980 Act reflects a "natural conclusion . . . that Congress intended the 1980 Act to terminate any trust that might have been created by the Appropriations Acts."[27]

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[25] *Passamaquoddy Tribe v. Morton*, 528 F.2d 370 (1st Cir. 1975).

[26] *Wolfchild v. United States*, 62 Fed.Cl. 521, 532 *rev'd*, 559 F.3d 1228 (Fed.Cir. 2009), *rehearing en banc denied* (June 11, 2009).

[27] U.S. Br. 15.

The "natural conclusion" is founded on the Solicitor General's unsubstantiated declaration that "[t]he United States cannot simultaneously hold those same lands in trust for the loyal Mdewakanton and their lineal descendants."[28] But, this declaration proves too much – contradicting Interior's policies from 1936 through 1980 where it recognized obligations to individual 1886 Mdewakanton while recognizing the post-1934 IRA community governments situated on 1886 lands. The Solicitor General's declaration could not be true because Interior approved community constitutions for Prairie Island and Lower Sioux in 1936 that expressly and exclusively *reserve* the vested rights of individual Loyal Mdewakanton to 1886 lands.[29]

The facts contrast with the Solicitor General's and the Federal Circuit's suggestion that there can be nothing akin to "trust on a trust." The communities' statutory existence under the IRA has been contingent on the 1886 Mdewakanton's rights and United States' obligations to them – because the communities are not historical tribes but recognized under the IRA

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[28] *Id.*

[29] In another apparent governmental breach, the same Loyal Mdewakanton vested rights were excluded from the SMSC constitution approved by Interior in 1969.

based on the 1886 Mdewakanton residing on reservation land.[30]

As the *amici* attest, the significance of the Opposition's erroneous interpretation of the 1980 Act is significant to Indian law. The Federal Circuit's interpretation of the 1980 Act as an implicit "termination act" of a trust *while* implicitly substituting a new statutory identity for post-1934 IRA non-tribal communities is troubling.

Congressional silence in the face of proposed statutory constructions that result in sweeping changes when adopted, without explicit language in the statute, violates this court's analogizing test to the "dog that did not bark:"

> [I]f Congress had such an intent, Congress would have made it explicit in the statute, or at least some of the Members would have identified or mentioned it at some point . . . Congress' silence in this regard can be likened to the dog that did not bark.[31]

The text of the 1980 Act does not contain words that terminate the 1886 Mdewakanton's beneficiary rights in the 1886 lands – nor words that establish a

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[30] 25 U.S.C. §476 (prior to amendments in Pub.L. 100-581, Stat. 2938-39 (1988) which contained a relevant savings clause at §103).

[31] *Chisom v. Roemer*, 501 U.S. 380, 396 n.23 (1991), *citing* A. Doyle, *Silver Blaze*, in *The Complete Sherlock Holmes* 335 (1927).

new statutory identity for the communities under the 1934 IRA. The legislative history is similarly silent as to terminating rights or creating a new identity for the three post-1934 IRA communities. At most, the 1980 Act was viewed as a "technical" statute that would result in "no changes in existing law."[32] nor any *additional cost* to the government with the Act's enactment.[33]

CONCLUSION

For the foregoing reasons, and those of the petition and the briefs of *amici curiae*, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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[32] S. Rep. No. 96-1047 at 3, 7. *See also* H.R. Rep. No. 96-1409 at 3.

[33] H.R. Rep. No. 96-1409 at 3; S. Rep. No. 96-1047 at 3. *See also* 96-1409 at 3 ("Enactment of H.R. 7417 will result in no cost to the United States").

Department of the Interior,

OFFICE OF INDIAN AFFAIRS,

WASHINGTON, Feb. 20, 1899.

James McLaughlin, Esq.,

U.S. Indian Inspector,

Present.

Sir:

Under date of November 22nd last, and in pursuance of instructions from the Department relating thereto, the work of making a complete census of the Medawakanton band of Sioux Indians in Minnesota, was placed in your hands in order that the names of all Indians if any, heretofore improperly enrolled as members of said band, might be eliminated from said rolls, and thereby prevented from receiving any further payments. This work having been undertaken by you, was not completed, owing to the fact that you were called away temporarily upon other duties, but I am advised that you will soon return to Minnesota to complete your labors relating to said census.

For the purpose of having certain work in connection with the purchase of land by Mr. Henton for the Medawakanton band of Sioux completed, on or before the completion of the census roll by you, instructions were addressed to Mr. Henton on the 23rd ultimo, to prepare a full and complete schedule of all lands purchased by him for said band of Indians and forward same to this office. Since the date of this

letter, this office has been advised of the decease of Mr. Henton.

With the view therefore of having the work, as outlined in [illegible] letter above named to Mr. Henton, completed, (copy herewith) you are requested if not incompatible with your other duties, but in connection therewith, to furnish this office with a complete schedule of all lands, purchased by the late Mr. Henton for the said Medawakanton band of Sioux Indians, giving in detail as far as possible the following information vís., 1st date of purchase, 2nd vendor or grantor, 3rd area, 4th cost, 5th subdivision, 6th location, giving section, township, range and county, 7th names of individuals Indians to whom said lands have been assigned by late Agent Henton, and also metes and bounds of such assignment where practicable, 8th, value of each piece or parcel of land so assigned. Also any other information relating to these lands that you may deem useful to the office.

For your information I herewith enclose a copy of a letter addressed to Rev. W.H. Knowlton of Redwood Falls, Minnesota, on the 24th ultimo, which gives in substance a statement, – as taken from the records of this office, – of all the appropriations that have been made for this band (Medawakanton Sioux) of Indians, from 1884 up to present time. It also furnishes the names of the different Special Agents that have been appointed from time to time to carry out the instructions of the government relating to these Indians.

There is also enclosed herewith for your information, and also as a guide in making up the foregoing schedule six (6) different plats of land purchased by Mr. Henton for said band of Indians and [illegible] by him October 24 last, to this office. After these have served your purpose you will please return them for the files of the office.

In a letter from Mr. Harry Henton (a son of the late Specail [sic] Agent) of Morton, Minn., dated 27th ultimo, he states that all the papers [illegible] of his father have been carefully preserved. It is probable that you may find it necessary, in making up the above named schedule, to have recourse to said papers, for which purpose a letter has this day been addressed to said Harry Henton, advising him of this additional work being placed in your hands, and requesting that he will afford you access to such official papers relating to the lands purchased by his father, as shall be found necessary by you.

As you are doubtless aware, the title to all the land purchased by late Agent Henton for said Indians, is still vested in the United States – being held in trust for them – and that in all probability steps will be taken at an early day looking to the allotment of said lands by the Department to such Indians as the late Agent has designated and are entitled thereto, and for this reason particularly as well also as for purposes of verification, this schedule is deemed necessary and important.

Very respectfully,

/s/ A.C. Tonner
Acting Commissioner

C.H.D.
L.

Tribal Operations

June 3, 1976

Memorandum

To: Commissioner of Indian Affairs
Attn: Tribal Government Services

From: Office of the Area Director

Subject: Disposition of Income from land purchased by the U.S. for the Mdewakanton Sioux residing in the State of Minnesota on May 20, 1886, and their descendants

Under date of May 26, 1976, we forwarded to your office resolutions presented from the Lower Sioux, Prairie Island and Shakopee Mdewakanton Sioux Communities requesting that the Bureau of Indian Affairs take whatever action is necessary to change the title of certain lands purchased for subject Sioux from "United States of America" to "United States of America in trust for" the respective communities. A copy of this with enclosures is enclosed for your ready reference. Enclosed also, is copy of Bureau of Indian Affairs audit report as of December 31, 1974, indicating subject income identified and placed in separate accounts. As of June 2, 1976, these funds total $65,563.97. Of this amount $63,460.11 represents principal and $1,903.86 interest. These funds will continue to be reinvested until such time as a determination is made on disposition of them. We are enclosing resolutions adopted by the three Sioux Communities involved regarding their desires in the division of these funds. You will note that the Prairie

Island and Lower Sioux Communities both request that funds identified as accruing from lands located in their community as well as future income from these lands shall remain with the respective communities. The Shakopee Mdewakanton Community on the other hand is requesting that the money be divided between the three communities. You will note from the audit report that there are no funds in the current amount which are identified as accruing from the Shakopee Community.

It is our feeling that we should not attempt to distribute such funds on the strength of the resolutions from the three communities at this time. There is a question as to whether the matter should be handled as recommended by the Community Councils. The land was originally purchased for the Mdewakanton Sioux residing in Minnesota on May 20, 1886, and their descendants. As you know we have not been able to locate a list of the Minnesota Sioux in Minnesota on May 20, 1886 and the Associate Solicitor's Office has under date of August 17, 1971, advised that we use the so-called Hinton and McLeod Rolls (copy enclosed). A very small portion of the descendants reside on the three Minnesota Sioux Communities today. A question arises as to whether all descendants would be entitled to the income similar to an Indian Claims Commission judgment award distributed to descendants. The September 30, 1915, letter of Assistant Commissioner Maritt indicates that apparently there were problems at that time with the administration of this land.

Also, enclosed is copy of a letter dated March 11, 1937, from the Assistant Commissioner to the Superintendent of the Winnebago Agency. Please note page 4 of this letter.

One suggestion to resolve this matter would be to incorporate the disposition of the funds with legislation converting the title. Another suggestion would be to develop a descendancy roll similar to a claims distribution, however, this would only dispose of funds accumulating up to the date of the payment and would have to be repeated in the future, or until title to the land is changed. We would appreciate your advice and authority for the disposition of subject funds.

S.G.D. George V. Goodwin
Area Director.

Enclosures

Minnesota Sioux AFO
MAO Realty
MAO Administration
Field Solicitor

Supreme Court, U.S.
FILED

09-849 JAN 14 2010

OFFICE OF THE CLERK

No. 09-

IN THE

Supreme Court of the United States

THE SHIPPING CORPORATION OF INDIA, LTD.

Petitioner,

v.

JALDHI OVERSEAS PTE LTD.

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether attachments under Rule B of the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions of the Federal Rules of Civil Procedure of electronic funds transfers ("EFTs") are precluded by New York State law, specifically §§ 4-A-502(4) & -503 of the New York Uniform Commercial Code?

2. Whether in order to maintain uniform rules relating to maritime matters, which was the fundamental purpose of certain provisions in the Constitution, conflicting provisions of State law that work material prejudice to the attachment remedy are invalid to that extent?

3. Whether no State, through its enactment of the Uniform Commercial Code, can purport to restrict or define "intangible" property subject to maritime attachment?

PARTIES TO THE PROCEEDING

Pursuant to Rule 14.1(b), the parties below are listed in the caption.

In addition, The Clearing House Association L.L.C. filed a motion to appear and submit a brief, as *amicus curiae*, which was granted at the time of the decision under review.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, petitioner states as follows:

It is majority owned by the government of India with shares listed on the Bombay Stock Exchange Ltd., Mumbai; The National Stock Exchange of India Ltd., Mumbai; The Calcutta Stock Exchange Associated Ltd., Kolkata; The Delhi Stock Exchange Association, Ltd., New Delhi; and Madras Stock Exchange Ltd., Chennai, India.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at *The Shipping Corporation of India Ltd. v. Jaldhi Overseas Pte, Ltd.*, 585 F.3d 58 (2d Cir. 2009) and is reprinted in the Appendix to the Petition ("Pet. App.") at A. The opinion of the United States District Court for the Southern District of New York ("District Court") is an unpublished decision that is available at 2008 U.S. Dist. LEXIS 49209 (S.D.N.Y. Jun. 27, 2008) and 2008 WL 2596229 (S.D.N.Y. Jun. 27, 2008) and reprinted at Pet. App. B ("Vacatur Order"). The Vacatur Order was based entirely on the District Court's prior opinion in *Seamar Shipping Corp. v. Kremikovtzi Trade Ltd.*, 461 F. Supp. 2d 222 (S.D.N.Y. 2006), which is reprinted at Pet. App. C.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit (the "Court of Appeals" or "Second Circuit") was entered on October 16, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, TREATIES AND STATUTORY PROVISIONS INVOLVED

Constitutional Provisions:

U.S. Const. art. I, § 8, cl. 3:

> Section 8. The Congress shall have Power . . .

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

* * *

U.S. Const. art. III, § 1:

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may ordain and establish.

* * *

U.S. Const. art. III, § 2:

Section 2. The judicial Power shall extend to all Cases in Law and Equity . . . to all Cases of admiralty or maritime Jurisdiction. . . .

* * *

U.S. Const. art. VI, cl. 2:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land, and the Judges in every State shall be bound thereby, any thing in the Constitution or Laws of any State to the Contrary notwithstanding.

STATUTES:

Rule B(1) of the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions of the Federal Rules of Civil Procedure ("Rule B" and "Admiralty Rules," respectively), Pet. App. D:

> (1) When Available; Complaint, Affidavit, Judicial Authorization, and Process. In an in personam action:
>
> > (a) If a defendant is not found within the district when a verified complaint praying for attachment and the affidavit required by Rule B(1)(b) are filed, a verified complaint may contain a prayer for process to attach the defendant's tangible or intangible personal property--up to the amount sued for--in the hands of garnishees named in the process.
> >
> > (b) The plaintiff or the plaintiff's attorney must sign and file with the complaint an affidavit stating that, to the affiant's knowledge, or on information and belief, the defendant cannot be found within the district. The court must review the complaint and affidavit and, if the conditions of this Rule B appear to exist, enter an order so stating and authorizing process of attachment and garnishment. The clerk may issue supplemental process

enforcing the court's order upon application without further court order.

(c) If the plaintiff or the plaintiff's attorney certifies that exigent circumstances make court review impracticable, the clerk must issue the summons and process of attachment and garnishment. The plaintiff has the burden in any post-attachment hearing under Rule E(4)(f) to show that exigent circumstances existed.

(d) (i) If the property is a vessel or tangible property on board a vessel, the summons, process, and any supplemental process must be delivered to the marshal for service.

(ii) If the property is other tangible or intangible property, the summons, process, and any supplemental process must be delivered to a person or organization authorized to serve it, who may be (A) a marshal; (B) someone under contract with the United States; (C) someone specially appointed by the court for that purpose; or, (D) in an action brought by the United States, any officer or employee of the United States.

(e) The plaintiff may invoke state-law remedies under Rule 64 for seizure

> of person or property for the purpose of securing satisfaction of the judgment.

Sections 4-A-502(4) and 4-A-503 of the New York Uniform Commercial Code ("N.Y.U.C.C."), Pet. App. D:

> Creditor process with respect to a payment by the originator to the beneficiary pursuant to a funds transfer may be served only on the beneficiary's bank with respect to the debt owed by that bank to the beneficiary. Any other bank served with the creditor process is not obliged to act with respect to the process.
>
> [and]
>
> For proper cause and in compliance with applicable law, a court may restrain (i) a person from issuing a payment order to initiate a funds transfer, (ii) an originator's bank from executing the payment order of the originator, or (iii) the beneficiary's bank from releasing funds to the beneficiary or the beneficiary from withdrawing the funds. A court may not otherwise restrain a person from issuing a payment order, paying or receiving payment of a payment order, or otherwise acting with respect to a funds transfer.

STATEMENT OF THE CASE

A. Background: Rule B And The Attachability Of "Intangible" Property

The importance of maritime attachment and its vital historical purposes have long been recognized by this Court. *See Manro v. Almeida*, 23 U.S. (10 Wheat.) 473, 490 (1825); *see also Swift & Co. Packers v. Compania Colombiana Del Caribe*, 339 U.S. 684, 693, 698 (1950); *In re Louisville Underwriters*, 134 U.S. 488, 490 (1890); *Atkins v. The Disintegrating Co.*, 85 U.S. (18 Wall.) 272 (1874).

In *Amoco Overseas Oil Co. v. Compagnie Nationale Algerienne De Navigation*, 605 F.2d 648, 655 (2d Cir. 1979), the Second Circuit stated:

> Because the perpetrators of maritime injury are likely to be peripatetic, *Ex Parte Louisville Underwriters*, 134 U.S. 488, 493, 10 S. Ct. 587, 33 L. Ed. 991 (1890), and since the constitutional power of the federal courts is separately derived in admiralty, U.S. Constitution Art. III § 2, suits under admiralty jurisdiction involve separate policies to some extent. This tradition suggests not only that jurisdiction by attachment of property should be accorded special deference in the admiralty context, but also that maritime actors must reasonably expect to be sued where their property may be found.

Id. (emphasis added).

Rule B(1)(a) permits "a prayer for process to attach the defendant's tangible or intangible property," where the conditions for that remedy exist. The quandary confronting U.S. Courts in the modern era, as well as the standard by which the Courts should fashion relief under Rule B, was aptly described by the District Court in *Yayasan Sabah Dua Shipping SDN BHD v. Scandinavian Liquid Carriers Ltd.*, 335 F. Supp. 441, 449 (S.D.N.Y. 2004):

> In this wired age, the location of an intangible, especially a bank account, is a metaphysical question. By and large, bank deposits exist as electronic impulses embedded in silicone chips. In a sense, therefore, bank funds are both everywhere and nowhere. But the problem is not a new one. Before the advent of electronic banking, courts grappled with the dilemma of pinpointing the location of intangible assets. It is a dilemma that calls for a practical judgment. As Judge Cardozo so eloquently put it in *Severnoe Securities v. London & Lancashire Inc.* [255 N.Y. 120, 123-24, 174 N.E. 299, 300 (1931)]:
>
> "The situs of intangibles is in truth a legal fiction, there are times <u>when justice and convenience requires that a legal situs be ascribed to them</u> . . . [citations omitted] . . . At the root of the selection is generally a common sense appraisal of the requirements of justice

> and convenience of particular conditions."

Id. (emphasis added).

The Second Circuit's decision in *United States v. Daccarett*, 6 F 3d. 37 (2d Cir. 1993), left no doubt that an EFT is an attachable *res*. *Daccarett* was an *in rem* forfeiture case, initiated under Rule C of the Admiralty Rules. There was, however, no occasion for the court there to consider who owned the funds because it involved an *in rem* proceeding. *Daccarett* did, however, helpfully clarify the juridical nature of an EFT:

> The claimants' conception of the intermediary banks as messengers who never hold the goods, but only pass the word along, is inaccurate. On receipt of the EFTs from the originating banks, the intermediary banks possess the funds, in the form of bank credits, for some period of time before transferring them on to the destination banks. While claimants would have us believe that modern technology moved the funds from the originating banks through the intermediary bank to their ultimate destination without stopping, that was not the case. With each EFT at least two separate transactions occurred: first, funds moved from the originating bank to the intermediary bank; then the intermediary bank was to transfer the funds to the destination bank, a correspondent bank in

> Colombia. While the two transactions can occur almost instantaneously, sometimes they are separated by several days. Each of the amounts at issue was seized at the intermediary bank after the first transaction had concluded and before the second had begun.

Id. at 54 (emphasis added).

Accordingly, "an EFT while it takes the form of a bank credit at an intermediary bank, is clearly a seizable *res* under the forfeiture statutes." *Id.* at 55. As *Winter Storm Shipping, Ltd. v. TPI*, 310 F.3d 263, 277 n. 11 (2d Cir. 2002) noted in relying on *Daccarett*, although the reference to the Admiralty Rules was subsequently deleted from 28 U.S.C. § 881(b) the "statutory restructuring does not alter the substantive reality that admiralty practice as expressed by the Admiralty Rules is incorporated into the drug civil forfeiture statute." *See also United States v. All Assets*, 571 F. Supp. 2d 1, 15-17 (D.D.C. 2008) (discussing use and role of Admiralty Rules in asset forfeiture actions). *Daccarett* has not been overturned and stands for a clear proposition, under Admiralty Rule C, of the attachability of an EFT "after the first transaction ha[s] concluded." An EFT's nature as a credit (necessarily held for someone's account) is therefore comparable to the nature of a bank account, which does not contain the depositor's cash but merely represents the bank's promise to pay the depositor, *i.e.* a credit. *Citizen's Bank of Md. v. Strumpf*, 516 U.S. 16 (1995); *United*

States v. Butterword-Judson Corp., 267 U.S. 387 (1925).[1]

B. The *Winter Storm* Rule

The District Court's Vacatur Order was directly contrary to the controlling law in the Second Circuit, at that time, that permitted maritime attachment of EFTs, whether "to or from" a Rule B defendant. *Winter Storm Shipping, Ltd. v. TPI*, 310 F. 3d 263, 278-79 (2d Cir. 2002) (the "*Winter Storm* Rule"). The *Winter Storm* Rule was premised on the language of "Rule B itself, which provides that a maritime plaintiff may 'attach the defendant's tangible or intangible personal property'". *Id.* at 276 (quoting Rule B). *Winter Storm* held that "[b]ecause that rule is derived from federal law, there is no occasion to look for guidance in state law," and, in any event, "this provision of the [New York] U.C.C. cannot abrogate Winter Storm's right to a maritime attachment." *Id.* at 278 (emphasis added). *See also Bank of New York v. Nickel*, 14 A.D. 3d 140, 146-47, 789 N.Y.S.2d 95, 100 (1st Dep't 2004) ("While

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[1] *See also* Joseph H. Sommer, *Where is the Economic Analysis of Payment Law?*, 83 Chi.-Kent L. Rev. 751, 754 (2008) ("Privity is potent in payment law, because most payment systems are built on contract. Payment systems rely on bank money; bank money relies on bank deposits; bank deposits are debt obligations; debt is contract. Payment transactions are built from these contractual units. A single account-based payment involves the two end parties, their banks, maybe some intermediaries, and perhaps some communications firms. Privity orders this complexity into simple pairwise relationships: between account holders and their banks, between banks, or between senders and their communications providers. U.C.C. Articles 4A and 8 are dominated by privity: it is very difficult to bring a claim outside the privity chain.").

promulgating its regulations, and defining interests in property, OFAC [Office of Foreign Assets Control] did not apply the UCC and was not limited by concepts of title under state law."). We submit that *Winter Storm* was correctly decided and should be reinstated by this Court.

The *amicus* briefs of The Clearing House Association L.L.C. ("Clearing House Association") and the Federal Reserve Bank of New York urging application of provisions of and commentary to the N.Y.U.C.C. to "abrogate" Rule B were rejected in *Winter Storm*.

In *Aqua Stoli Shipping Ltd. v. Gardner Smith Pty Ltd.*, 460 F.3d 434 (2d Cir. 2006) and *Consub Delaware LLC v. Schahin Engenharia Ltda.*, 543 F.3d 104 (2d Cir. 2008) the Second Circuit had two further opportunities to consider the Clearing House Association's arguments that the *Winter Storm* Rule had caused its members substantial administrative burdens and "could, if left uncorrected, discourage dollar-denominated transactions and damage New York's standing as an international financial center," Pet. App. 7a.[2] On both occasions the Second Circuit again refused to pre-empt Rule B by application of the N.Y.U.C.C. or accept that its application to EFTs had any of the dire and "significant" "unforeseen consequences" raised by the *amicus*.

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[2] Citing, *e.g.*, Lawrence W. Newman & David Zoskowsky, *Is There Finally a Backlash Against Rule B Attachments?*, Permanent Editorial Bd. for the Uniform Commercial Code, PE Commentary 6, 241 N.Y.L.J. 3 (2009).

Indeed, only a year earlier, in *Consub Delaware*, the court had stated:

> There has been no decision by an en banc panel overruling *Winter Storm*. Moreover, there is no justification for departing from the principle of *stare decisis* here where [defendant] has not shown that *Winter Storm* is unworkable, and where admiralty jurisdiction is the subject of congressional legislation and Congress remains free to alter the *Winter Storm* rule. In any event, *Winter Storm* was correctly decided.

Consub Del., 543 F.3d at 109 (emphasis added).

Those three Second Circuit decisions followed a long line of authority from this Court rejecting application of State law to affect maritime issues, as discussed below.

C. The Decisions Below

The Shipping Corporation of India ("SCI") filed its Rule B action against Jaldhi Overseas Pte Ltd. ("Jaldhi") in the District Court to obtain security for its claims in London arbitration arising from a breach of charter party. SCI asserted, and states for the purposes of Rule 14(g)(ii), the District Court's admiralty or maritime jurisdiction under 28 U.S.C. § 1333, as well as subject matter jurisdiction under 9 U.S.C. § 8. SCI subsequently attached EFTs in the sum of $4,873,404.90, of which $4,590,678.60 were transmitted by third parties to Jaldhi, as

"beneficiary" (the "Beneficiary EFTs"). The balance were "originator" EFTs. Pet. App. 14a.

Jaldhi moved under Supplemental Rule E of the Admiralty Rules solely to vacate the Beneficiary EFTs. The District Court granted Jaldhi's motion based on its prior decision in *Seamar Shipping Corp. v. Kremikovtzi Trade Ltd.*, 461 F. Supp. 2d 222 (S.D.N.Y. 2006), *see* Pet. App. 33a, which vacated attachment of EFTs of which the defendant was a beneficiary. All other District Court judges in the Second Circuit that had considered the issue had followed the *Winter Storm* Rule.[3]

In *Seamar* the District Court had relied, *inter alia*, on the "absence of a federal rule governing whether an EFT is the property of an intended beneficiary while in transit" so as to apply N.Y. U.C.C. § 4-A-502 *cmt. 4.* Pet. App. 44a. Pursuant to such State law, the *Seamar* court ruled that a Rule B defendant has "no property interest" in a beneficiary EFT as required by Rule B(1)(a). Pet. App. 44a. The Vacatur Order adopted that reasoning. Pet. App. 33a ("EFTs directed by third parties to a defendant do not become the defendant's property until the transfer is completed" (citing *Seamar*)).

The District Court, recognized that the precise issue was *sub judice* because of the pending appeal in *Consub Delaware* and stayed the Vacatur Order for

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[3] *See Cia. Sudamericana de Vapores S.A. v. Sinochem Tianjin Co.*, 2007 WL 1002265, *3 (S.D.N.Y. Apr. 4, 2007) ("the parties agree that every decision in this District except *Seamar Shipping* holds that defendants who are beneficiaries of an EFT in the hands of intermediary banks have a sufficient property interest for attachment under Rule B(1)(a)").

ninety days pending a decision in that appeal. That stay was further extended by a temporary stay order of the Court of Appeals.

On appeal neither party questioned the *Winter Storm* Rule. Jaldhi only questioned whether the rule, as interpreted by *Aqua Stoli*, 460 F.3d at 435, extended to EFTs from third parties directed to the Rule B defendant, as beneficiary.[4] Pet. App. 3a-4a ("Specifically, the appeal raises the issue of whether EFTs of which defendants are the beneficiary are attachable property . . .").

Nonetheless, the Court of Appeals considered that it was "now presented with the question of whether the rule in *Winter Storm* should be reconsidered and, upon reconsideration, overruled." Pet. App. 4a. Neither party had raised or briefed that issue. The Clearing House Association, which had raised the issue as *amicus* in *Aqua Stoli* and in *Consub Delaware*, had filed a tardy motion in February 2009 (briefing was completed in December 2008) seeking leave to file an *amicus* brief. That motion had not been granted at the time of oral argument in May 2009. The motion was not granted until the date of the decision under review, by order of even date deeming its brief filed.

The Court of Appeals noted that the *Winter Storm* Rule had "produced a body of critical commentary," and that "some have even suggested that *Winter Storm* has threatened the usefulness of

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[4] Jaldhi also cross-appealed the District Court's denial of counter-security based on the Foreign Sovereign Immunity Act, 28 U.S.C. §§ 1602-1611.

the dollar in international transactions" and "New York's standing as a center of international banking and finance." Pet. App. 4a-6a (citations and quotations omitted). Recognizing that "it would ordinarily be neither appropriate nor possible for us to reverse an existing Circuit precedent," Pet. App. 18a-19a, the court stated that it had employed what it referred to "as a mini-en banc" process of circulating its opinion "to all active members of this Court prior to filing" without objection, Pet. App. 19a n.9.

Contrary to Judge Cardozo's comments on the "situs of intangibles", *supra*, and this Court's lessons on the importance of maritime attachment, *see, e.g., Manro*, 23 U.S. at 487, *supra* at 6, the Second Circuit stated that it was "unaware of any historical rationale that justifies the extension of federal maritime common law to support the Rule B practices that have taken place under the rule of *Winter Storm*", *i.e.*, to "this wired age." Pet. App. 25a. It then considered that "[w]here there is no federal maritime law to guide our decision, we generally look to state law to determine property rights." Pet. App. 26a (citations omitted). That resort led to a pre-ordained result, as *amicus* had been urging.

The Second Circuit reasoned that reversal of *Winter Storm et al.* was appropriate because "New York State does not permit attachment of EFTs that are in the possession of an intermediary bank" and "the New York Uniform Commercial Code states that *a beneficiary has no property interest* in an EFT." Pet. App. 28a (emphasis added). The court concluded:

> Because EFTs in the temporary possession of an intermediary bank are not *property* of either the originator or the beneficiary under New York law, they cannot be subject to attachment under Rule B. . . . If the EFTs are not the *property* of either the originator or the beneficiary, then they cannot be "defendant's . . . *property*" and therefore are not subject to Rule B attachment.

Pet. App. 28a-29a (emphasis added) (second omission in source).

Accordingly, *Jaldhi* overruled *Winter Storm* and clarified that by so doing "we also abrogate any decision insofar as it has relied on *Winter Storm*, specifically [*Consub Delaware*]." Pet. App. 4a n.3.

The remanded issue of whether "there are other grounds for not vacating" the EFTs originated by Jaldhi was summarily dealt with, prior to briefing, by the District Court's further order vacating those attachments.

REASONS FOR GRANTING THE PETITION

The Second Circuit recognized that its decision in *Jaldhi* "[o]verturning *Winter Storm* will dramatically affect the law of maritime attachments in our Circuit." Pet. App. 8a. The import of the decision goes well beyond that and the Second Circuit. As discussed below, and in *Winter Storm*, 310 F.3d at 267-268:

> As early as 1825, the Supreme Court was able to say of the right of attachment in *in personam* admiralty cases that "this Court has entertained such suits too often, without hesitation, to permit the right now to be questioned." *Manro v. Almeida*, 23 U.S. (10 Wheat.) 473, 486, 6 L. Ed. 369 (1825). "Maritime attachment is a feature of admiralty jurisprudence that antedates both the congressional grant of admiralty jurisdiction to the federal district courts and the promulgation of the first Supreme Court Admiralty Rules in 1844." *Aurora Maritime Co. v. Abdullah Mohamed Falem & Co.*, 85 F.3d 44, 47 (2d Cir. 1996). Admiralty Rule B, quoted in part *supra*, contains the current provisions governing maritime attachment. "Rule B is simply an extension of this ancient practice." *Aurora*, 85 F.3d at 47-48.

That right was explicitly "questioned" and materially prejudiced by the decision below. In failing to acknowledge the reality of modern maritime commerce, which relies on the use of dollar EFTs for transacting payments as much as the internet for communications, and by improperly resorting to State law based on "critical commentary" of the rules' "unfavorable" consequences, Pet. App. 4a-8a, *Jaldhi* has undermined the ancient maritime remedy of attachment and has effectively limited its reach. The decision must be reviewed because it is an unconstitutional and destructive of uniformity.

The body of federal precedent that has developed over centuries to determine the type of property and kind of interest, both "tangible and intangible", as provided for and protected by Rule B, does not require "default" reference to State law. To the contrary, such resort to State law to determine the scope of this ancient remedy is an impermissible derogation of the Constitutional protection of admiralty matters under the Admiralty Clause, U.S. Const. art. III, § 2, as well as the Supremacy Clause, U.S. Const. art. VI. It is also contrary to the requirement that the "Federal Rules should be given their plain meaning," *Walker v. Armco Steel Corp.*, 446 U.S. 740, 750 (1980), and "intangible property" an interpretation consistent with the expansive intention of these words, *see Winter Storm*, 310 F.3d at 276 ("It is difficult to imagine words more broadly inclusive...").

The Clearing House Association, which operates the Clearing House Interbank Payments System ("CHIPS") is based in New York and its member banks process over 95% of cross-border U.S. dollar transactions.[5] Accordingly, as a practical matter, the attachment of EFTs as "intangible property" under Rule B is a uniquely Second Circuit issue and remedy. There is not now and likely never will be a conflict between the Circuit courts as to the attachability of EFTs under Rule B for that reason. The Court, nevertheless, must review the constitutionality of *Jaldhi* under the Constitutional principles and precedent[6] cited in *Exxon Shipping*

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[5] *See* www.chips.org/home.php.

[6] *Citing* U.S Const. art. III § 2, cl. 1; *see, e.g., Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 259 (1979)

Co. v. Baker, 554 U.S. ___, 128 S. Ct. 2605, 2620, 171 L. Ed. 2d 570, 584 (2008) where the Court stated:

> . . . we are acting here in the position of a common law court of last review, faced with the perceived defect in a common law remedy.

128 S. Ct. at 2629, 171 L. Ed. 2d at 594.

THE SECOND CIRCUIT IMPERMISSIBLY APPLIED STATE LAW TO WORK MATERIAL PREJUDICE TO THE ANCIENT MARITIME REMEDY OF ATTACHMENT

In *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 216 (1917), the Court stated, after examining Mr. Justice Bradley's ruling for the Court in *The Lottawanna*, 88 U.S. 558 (1875):

> In view of these constitutional provisions [U.S. Const. art. III, § 2 and art. I, § 8] and the federal act it would be difficult, if not impossible, to define with exactness just how far the general maritime law may be changed, modified, or affected by state legislation. That this may be done to some extent cannot be denied. . . . And plainly, we think, no such legislation is valid if it contravenes the essential purpose expressed by act of Congress or

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("Admiralty law is judge-made law to a great extent"); *Romero v. Int'l Terminal Operating Co.*, 358 U.S. 354, 360-361 (1959) (constitutional grant "empowered the federal courts . . . to consider the development of [maritime] law").

> works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in its international and interstate relations. This limitation, at the least, is essential to the effective operation of the fundamental purpose for which such law was incorporated into our national laws by the Constitution itself. These purposes are forcefully indicated in the foregoing quotations from *The Lottawanna*.

Id. (emphasis added).

The "quotations" referred to from *The Lottawanna*, 88 U.S. at 574-575, were:

> That we have a maritime law of our own, operative throughout the United States, cannot be doubted. The general system of maritime law which was familiar to the lawyers and statesmen of the country when the Constitution was adopted, was most certainly intended and referred to when it was declared in that instrument that the judicial power of the United States shall extend "to all cases of admiralty and maritime jurisdiction." . . .
>
> One thing, however, is unquestionable; the Constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole

> country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several States, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign states.

Id. (emphasis added).

The Constitution commands that maritime matters be governed by federal law, not that of the "several States." U.S. Const. art. III, § 2; U.S. Const. art. I, § 8, cl. 3.

Knickerbocker Ice Co. v. Stewart, 253 U.S. 149, 155 (1920) addressed an award to the widow of a drowned bargeman under the Workman's Compensation Law of New York. The Court reviewed its earlier decisions in, *inter alia, Southern Pacific Co.*, 244 U.S. at 217-18 (invalidating New York's Workmen's Compensation Act as unconstitutional); *Chelentis v. Luckenbach S.S. Co.*, 247 U.S. 372, 382 (1918) (declining to permit a seaman to apply state law providing for greater damages in his personal injury action against his employer); *Union Fish Co. v. Erickson*, 248 U.S. 308, 314 (1919) (declining to apply California statute to invalidate maritime contract) and concluded:

> Since the beginning, federal courts have recognized and applied rules and principles of maritime law as something

> distinct from laws of the several states – not derived from or dependent on their will. The foundation of the right to do this, the purpose for which it was granted, and the nature of the system so administered were distinctly pointed out long ago.

253 U.S. at 160-161; *see also Kossick v. United Fruit Co.*, 365 U.S. 731, 741-42 (1961) (refusing to apply New York's Statute of Frauds to seaman's breach of contract claim since Supremacy Clause, U.S. Const. art. VI, carries with it the implication that wherever a maritime interest is involved, that interest displaces a local interest no matter how significant); *Panama R.R. Co. v. Johnson*, 264 U.S. 375, 386 (1924) (purpose of the "framers of the Constitution" was "to place the entire subject – its substantive as well as its procedural features – under national control because of its intimate relation to navigation and to interstate and foreign commerce"). *See generally Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199, 210 (1996) (observing that "in several contexts, we have recognized that vindication of maritime policies demanded uniform adherence to a federal rule of decision, with no leeway for variation or supplementation by state law"); *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 244 n.10 (1942) (noting that "[i]n many other cases this Court has declared the necessary dominance of admiralty principles in actions in vindication of rights arising from admiralty law") (both collecting cases).

This principle was re-affirmed by this Court in *American Dredging Co. v. Miller*, 510 U.S. 443, 451 (1994), and again recently in *Norfolk Southern Ry. v.*

James N. Kirby, Pty Ltd., 543 U.S. 14, 28 (2004). In *Exxon Shipping Co. v. Baker*, 554 U.S. ___, 128 S. Ct. 2605, 2630 n.21, 171 L. Ed.2d 570, 595 n.21 (2008) the Court stated that "modern-day maritime cases" "support judicial action to modify a common law landscape largely of our own making" and added:

> The character of maritime law as a mixture of statutes and judicial standards, "an amalgam of traditional common-law rules, modifications of those rules, and newly created rules," *East River S.S. Corp. v. Transamerica Delaval Inc.*, 476 U.S. 858, 865, 106 S. Ct. 2295, 90 L. Ed 2d 865 (1986), accounts for the large part we have taken in working out the governing maritime tort principles.
>
> * * *
>
> And for the very reason that our exercise of maritime jurisdiction has reached to creating new causes of action on more than one occasion, it follows that we have a free hand in dealing with an issue that is "entirely a remedial matter."
>
> * * *
>
> ". . . But the Judiciary has traditionally taken the lead in formulating flexible and fair remedies in the law maritime, and Congress has largely left to this Court the responsibility for fashioning

> the controlling rules of admiralty law" [quoting *United States v. Reliable Transfer Co.*, 421 U.S. 397, 409 (1975)].
>
> * * *
>
> Where there is a need for a new remedial maritime rule, past precedent argues for our setting a judicially derived standard, subject of course to congressional revision.

Id. (citations and internal quotations omitted).

Jaldhi is in conflict with this Court's long line of precedent concerning the invalidity of state legislation which "works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in its international and interstate relations." *Southern Pacific Co. v. Jensen*, 244 U.S. at 216.

More than any other Circuit decision relating to maritime attachment in the last fifty years, *Jaldhi* merits review by this Court so that the Court may fashion a rule of attachability of "intangible" property consistent with the historical purpose of maritime attachment of "intangible property" in this "wired age", and to prevent the default to inapplicable and potentially inconsistent State law that would disrupt the uniformity necessary to the smooth functioning of maritime commerce. *See, e.g., U.S. Express Lines, Ltd. v. Higgins*, 281 F.3d 383, 391 (3d Cir. 2002) ("the area of maritime attachments [is] a subject of particular concern to the

federal courts, and one where national uniformity is of some importance.")

JALDHI DESTROYS UNIFORMITY

Even if all fifty states adopted identical versions of N.Y.U.C.C. Article 4-A, Pet. App. D, (which has not happened), application of State law would still disrupt the necessary uniformity in the availability of maritime attachments. *See generally* Norman Silber, *Why the U.C.C. Should Not Subordinate Itself to Federal Authority: Imperfect Uniformity, Improper Delegation and Revised Section 3-102(c)*, 55 U. Pitt. L. Rev. 442, 452-53, 456-57, 459-60, nn.72, 134, 139 & 142 (1994) (discussing the deliberate choice made to enact a fifty-state statute rather than a federal statute so that, if desired, states could depart from the standard); *see also* Michael F. Sturley, *Uniformity in the Law Governing the Carriage of Goods by Sea*, 26 J. Mar. L. & Comm. 553, 567 (1995) (discussing how apparent uniformity-adoption of the same text-quickly degenerates into inconsistency); Albert H. Conrad, Jr. & Richard P. Kessler, Jr., *Proposed Revisions to the Georgia Uniform Commercial Code: A Status Report*, 43 Mercer L. Rev. 887, 898 & nn.80, 899 (1992) (uniform law approaches have been insufficiently responsive to emerging technologies, economic considerations, and consumer protection needs, and such responsiveness can only be achieved through federal action).

As the Court of Appeals recognized in *Aurora Maritime Co. v. Abdullah Mohamed Falem & Co.*, 85 F.3d 44, 48-49 (2d Cir. 1996):

> [L]eaving the functional usefulness of Rule B attachments to the vagaries of the laws of the fifty states would create a measure of anarchy . . . inconsistent with an ancient purpose of admiralty law . . . [and] detrimental to international commerce.

The Admiralty Rules, including Rule B, are a necessary feature of the federal procedural rules adopted pursuant to the Rules Enabling Act of 1934, and to the extent that Rule B conflicts with State law, such as the N.Y.U.C.C., the latter cannot be applied, as in *Jaldhi*, to "abrogate" the former.

Moreover, in accordance with the general rule that the UCC is displaced by federal law in cases involving federal subject matter,[7] the drafters of UCC Article 4-A anticipated that conflicts would arise between Article 4-A and federal law and that federal law would prevail in such cases. For example, in comment 3 to § 4-A-107, the UCC drafters noted that "federal preemption would make ineffective any Article 4-A provision that conflicts with federal law." *See* Thomas C. Baxter, Jr. & Raj

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[7] *See, e.g., N. Am. Phillips Corp. v. Emery Air Freight Corp.*, 579 F.2d 229, 233-34 (2d Cir. 1978) (federal law preempts all state law in interstate shipments); *Nat'l Garment Co. v. N.Y., Chi. & St. Louis R.R. Co.*, 173 F.2d 32, 35 (8th Cir. 1949) (federal law preempts state law in interpreting bills of lading); *Starmakers Pub. Corp. v. Acme Fast Freight, Inc.*, 615 F. Supp. 787, 791 (S.D.N.Y. 1985) (Interstate Commerce Act, not the UCC, governs interstate shipments); *Rio Grand Motor Way, Inc. v. Resort Graphics, Inc.*, 740 P.2d 517, 520 (Colo. 1987) (federal law preempts conflicting state UCC law on warehouseman's liens).

Bhala, *The Interrelationship of Article 4-A with Other Law*, 45 Bus. Law. 1485, 1493 (1990).

The relevant sections of N.Y.U.C.C. Article 4-A are in direct conflict with Rule B because they would prohibit the federal courts from exercising powers conferred by Rule B in two respects: (1) by preventing courts from issuing restraining orders to certain garnishees, even if it were impossible at the commencement of suit to determine the status of a garnishee in the relevant transaction (N.Y.U.C.C. § 4-A-503) and, even though Rule B contains no such prohibition, and (2) if a court nevertheless issued a Rule B attachment order, by sometimes excusing garnishees from compliance (*Id.* § 4-A-502) when they would otherwise be subject to contempt sanctions for disobedience, thus compromising the authority of an admiralty court to enforce its orders.

As this Court explained in *Hanna v. Plumer*, 380 U.S. 460, 473-74 (1965): "[t]o hold that a Federal Rule of Civil Procedure must cease to function whenever it alters the mode of enforcing state-created rights would be to disembowel either the Constitution's grant of power over federal procedure or Congress' attempt to exercise that power in the Enabling Act."

Reading Rule B without resort to state law does not create any new substantive rights because maritime plaintiffs have always had a right to attach the tangible and intangible property of maritime defendants, wherever and in nearly whatever form it may be found in the district. *Jaldhi*'s reliance on N.Y.U.C.C. to deny that right cannot be left unreviewed, and it is this Court that has the last

word in the development of this ancient remedy in the Twenty-First Century. Review and reinstatement of the *Winter Storm* Rule by the Court would be in keeping with its role of "formulating flexible and fair remedies in the law maritime." United States v. Reliable Transfer Co., 421 U.S. 397, 409 (1975); *see also supra* at 23-24.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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January 14, 2010

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DECIDED OCTOBER 16, 2009

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

Docket Nos. 08-3477-cv(L), 08-3758-cv(XAP).

THE SHIPPING CORPORATION OF INDIA LTD.,

Plaintiff-Counter-Defendant-
Appellant-Cross-Appellee,

v.

JALDHI OVERSEAS PTE LTD.,

Defendant-Counter-Claimant-
Appellee-Cross-Appellant.

Argued: May 5, 2009
Decided: October 16, 2009

Before: FEINBERG, WINTER, and CABRANES Circuit Judges.

JOSÉ A. CABRANES, Circuit Judge:

This case is based on a dispute between a company incorporated in India and a company incorporated in Singapore over an accident that occurred in India while one company was shipping products to China; the

dispute was to be arbitrated in England. Because the parties' banks had accounts in New York banks, electronic fund transfers ("EFTs")[1] between one party

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1. We explained the operation of EFTs in *United States v. Daccarett*, 6 F.3d 37, 43-44 (2d Cir. 1993) and paraphrase that explanation here:

> An EFT is nothing other than an instruction to transfer funds from one account to another. When the originator and the beneficiary each have accounts in the same bank that bank simply debits the originator's account and credits the beneficiary's account. When the originator and beneficiary have accounts in different banks, the method for transferring funds depends on whether the banks are members of the same wire transfer consortium. If the banks are in the same consortium, the originator's bank debits the originator's account and sends instructions directly to the beneficiary's bank upon which the beneficiary's bank credits the beneficiary's account. If the banks are not in the same consortium—as is often true in international transactions—then the banks must use an intermediary bank. To use an intermediary bank to complete the transfer, the banks must each have an account at the intermediary bank (or at different banks in the same consortium). After the originator directs its bank to commence an EFT, the originator's bank would instruct the intermediary to begin the transfer of funds. The intermediary bank would then debit the account of the bank where the originator has an account and credit the account of the bank where the beneficiary has an account. The originator's bank and the beneficiary's bank would then adjust the accounts of their respective clients. *See* Amicus Br. 9-11.

(Cont'd)

involved in the dispute and third parties passed through New York electronically for an instant. Under *Winter Storm Shipping, Ltd. v. TPI*, 310 F.3d 263, 278 (2d Cir. 2002), this momentary passage was sufficient to vest jurisdiction in the United States District Court of the Southern District of New York.

We are now presented with the question of whether the rule of *Winter Storm* should be reconsidered and, upon reconsideration, overruled. Specifically, this appeal

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(Cont'd)

> To more concretely illustrate the circumstances of the instant case, consider the following example: ABC Shipping wants to transfer $ 100 to XYZ Overseas. ABC has an account at India National Bank, and XYZ has an account at Bank of Thailand. India National Bank and Bank of Thailand do not [belong to the same consortium, but each has an account at New York Bank. To begin the transfer, ABC instructs India National Bank to transfer $ 100 to XYZ's account at Bank of Thailand. India National Bank then debits ABC's account and forwards the instruction to New York Bank. New York Bank then debits India National's account and credits Bank of Thailand's account. Bank of Thailand then credits XYZ's account, thereby completing the transfer.
>
> We refer to the transferor in an EFT as the "originator" and the transferee as the "beneficiary." References to "a defendant" or "defendants" generally—as opposed to specific references to Jaldhi Overseas Pte Ltd.—indicates the party, whether originator or beneficiary, whose property is the object of a Rule B attachment.

raises the issue of whether EFTs of which defendants are the beneficiary are attachable property of the defendant pursuant to Rule B of the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions of the Federal Rules of Civil Procedure ("Rule B" of "the Admiralty Rules")[2] under our decisions in *Winter Storm*, 310 F.3d at 278, *Aqua Stoli Shipping Ltd. v. Gardner Smith Pty Ltd.*, 460 F.3d 434, 436 (2d Cir. 2006), and *Consub Delaware LLC v. Schahin Engenharia Limitada*, 543 F.3d 104, 109 (2d Cir. 2008). We now conclude, with the consent of all of the judges of the Court in active service, that *Winter Storm* was erroneously decided and therefore should no longer be binding precedent in our Circuit.[3]

Our decision in Winter Storm produced a substantial body of critical commentary. Indeed, within four years

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2. Rule B(1)(a) of the Admiralty Rules states, in relevant part:

> If a defendant is not found within the district, when a verified complaint praying for attachment and the affidavit required by Rule B(1)(b) are filed, a verified complaint may contain a prayer for process to attach the defendant's tangible or intangible personal property—up to the amount sued for—in the hands of garnishees named in the process.

Fed. R. Civ. P. Supp. R. B(1)(a).

3. For clarity, we pause to note that HN3Go to the description of this Headnote.by overturning Winter Storm, we also abrogate any decision insofar as it has relied on *Winter Storm*, specifically, *Consub Delaware LLC v. Schahin Engenharia Limitada*, 543 F.3d 104 (2d Cir. 2008).

of our decision, we ourselves had begun to question the correctness of *Winter Storm*, *see Aqua Stoli*, 460 F.3d at 445 n.6 ("The correctness of our decision in Winter Storm seems open to question . . . ."), as have, more recently, some judges of the United States District Court for the Southern District of New York, *see e.g.*, *Hannah Bros. v. OSK Mktg. & Commc'ns, Inc.*, 609 F. Supp. 2d. 343, 352 n.3 (S.D.N.Y. 2009) ("The discussion above also underscores a point that has become conventional wisdom in this district—that *Winter Storm* and *Aqua Stoli* may merit reconsideration . . . ." (emphasis added)). Various commentators and courts have suggested that Winter Storm directly led to strains on federal courts and international banks operating within our Circuit. *See, e.g.*, Permanent Editorial Bd. for the Uniform Commercial Code, PEB Commentary No. 16: Sections 4A-502(d) and 4A-503, at 5 n.4 (July 1, 2009) ("PEB Commentary") ("[T]he Winter Storm approach is proving to be practically unworkable."). And some have even suggested that *Winter Storm* has threatened the usefulness of the dollar in international transactions. *See generally id.* ("[T]his explosion of writs creates an additional threat to the U.S. dollar as the world's primary reserve currency and New York's standing as a center of international banking and finance."); *see also* Lawrence W. Newman & David Zaslowsky, *Is There Finally a Backlash Against Rule B Attachments?*, 241 N.Y. L.J. 3 (2009) ("[W]hen lawyers are advising their clients that the best way to avoid Rule B attachments is to conduct maritime and perhaps other transactions in a currency other than U.S. dollars, there are emerging risks of a significant reduction in the use

of the dollar as the dominant currency of international commerce.").

The unforeseen consequences of *Winter Storm* have been significant. According to *amicus curiae* The Clearing House Association L.L.C.—whose members are ABN AMRO Bank N.V.; Bank of America, National Association; The Bank of New York Mellon; Citibank, National Association; Deutsche Bank Trust Company Americas; HSBC Bank USA, National Association; JPMorgan Chase Bank, National Association; UBS AG; U.S. Bank National Association; and Wells Fargo Bank, National Association—from October 1, 2008 to January 31, 2009 alone "maritime plaintiffs filed 962 lawsuits seeking to attach a total of $ 1.35 billion. These lawsuits constituted 33% of all lawsuits filed in the Southern District, and the resulting maritime writs only add to the burden of 800 to 900 writs already served daily on the District's banks." Amicus Br. 3-4. Judge Scheindlin recently outlined the effect of *Winter Storm* on international banks located in New York:

> This Court was recently informed that, currently, leading New York banks receive numerous new attachment orders and over 700 supplemental services of existing orders each day. This is confirmed by the striking surge in maritime attachment requests in this district, which now comprise approximately one third of all cases filed in the Southern District of New York. As a consequence, New York banks have hired additional staff, and

> suffer considerable expenses, to process the attachments. The sheer volume . . . leads to many false "hits" of funds subject to attachment, which has allegedly introduced significant uncertainty into the international funds transfer process.

Cala Rosa Marine Co. Ltd. v. Sucres et Deneres Group, 613 F. Supp. 2d 426, 431-32 n.7 (S.D.N.Y. 2009) (citation omitted).

Our holding in *Winter Storm* not only introduced "uncertainty into the international funds transfer process," *id.*, but also undermined the efficiency of New York's international funds transfer business. As the Federal Reserve Bank of New York noted in its amicus curiae brief in support of the motion for rehearing en banc by the defendant in *Winter Storm*, "efficiency is fostered by protecting the intermediary banks; justice is fostered by expressly telling litigants where the process should be served. . . . [*Winter Storm*] disrupt[ed] this balance and threaten[ed] the efficiency of funds transfer systems, perhaps including Fedwire." Amicus Br. of Federal Reserve Bank of New York 9, *Winter Storm*, 310 F.3d 263 (No. 02-7078). Undermining the efficiency and certainty of fund transfers in New York could, if left uncorrected, discourage dollar-denominated transactions and damage New York's standing as an international financial center. *See, e.g.*, PEB Commentary 6 n.4 ("*Winter Storm* and its progeny have had a far greater, and damaging, potential impact

on U.S. and foreign banks located in New York than might have been anticipated."); Newman & Zaslowsky, 241 N.Y. L.J. at 3.

Overturning *Winter Storm* will dramatically affect the law of maritime attachments in our Circuit, but we must not overstate the practical effect of our holding in this case. Since we decided *Winter Storm*, decisions in both our Court and in the Southern District of New York have cabined *Winter Storm* to minimize its effects on the courts and banks of New York without overturning Winter Storm directly. *See, e.g.*, *STX Panocean (UK) Co. v. Glory Wealth Shipping Pte Ltd.*, 560 F.3d 127, 133 (2d Cir. 2009); *Cala Rosa*, 613 F. Supp. 2d at 432; *Marco Polo Shipping Co. Pte v. Supakit Prods. Co.*, No. 08 Civ. 10940, 2009 U.S. Dist. LEXIS 19057, at *4 (S.D.N.Y. Mar. 4, 2009). Although these cases have further complicated the law of Rule B attachments, they have also limited the reach of *Winter Storm* and thus necessarily limited the effect of our decision in the instant case.

In *STX Panocean*, we recently held that by merely registering as a domestic corporation with the New York Secretary of State, a defendant is "found" within the district for the purposes of Rule B attachment. 560 F.3d at 133. Because Rule B provides for attachment of defendant's property that is found within the district *only if* the defendant itself is *not* found within the district, our ruling in *STX Panocean* allows an international firm to avoid having its property—including property other than EFTs—attached simply

by registering as a domestic corporation in New York State. Although the implications of *STX Panocean* are unknown, it would not be surprising if many international firms that engage in dollar-denominated transactions register in New York State to avoid attachment of their property.

In *Cala Rosa*, Judge Scheindlin denied a maritime plaintiff's request for "continuous service" of an attachment on banks—a decision that, if upheld on appeal, would likely further limit the usefulness of attachments of EFTs. 613 F. Supp. 2d at 432. In light of our decision in *Reibor International Ltd. v. Cargo Carriers Ltd.*, 759 F.2d 262, 266 (2d Cir. 1985), which held that an attachment is void unless a garnishee actually "possesses" defendant's property when the attachment is served, and the instantaneous nature of most EFTs, Judge Scheindlin's decision renders many maritime attachments effectively unenforceable. As Judge Scheindlin explained:

> Many courts, including this one, have noted that in light of Reibor a continuous service provision is necessary, in practice, to allow attachment of EFTs. That is no doubt true. But Reibor provides the proper response to this concern: the New York "rule works, to be sure, to the detriment of an attaching creditor, but that is simply the way the law was intended to operate."

> Many courts have also expressed concern that in the absence of a continuing service provision, plaintiffs will post process servers at bank offices around the clock in an attempt to capture EFTs at the precise moment of their arrival. I agree that this is likely and that this would be highly disruptive to New York banks. Accordingly, I decline to specially appoint any plaintiff-designated process servers. As a result, pursuant to Rule B(1)(d)(ii), I authorize only the United States Marshals to serve the process and any supplemental process.
>
> Plaintiff expresses concern that this will impose an undue burden on the United States Marshals. Plaintiff's concern, though appreciated, is overstated: nothing requires the Marshals to repetitively serve the banks with attachment orders around the clock. Further, plaintiff's duty to bear the costs of Marshal-served processes will help limit the Marshals' workload.

Cala Rosa, 613 F. Supp. 2d at 432 (footnotes omitted) (quoting *Reibor*, 759 F.2d at 268). A Circuit-wide decision rejecting a continuous service provision in the case of the attachment of EFTs would arguably limit the reach of *Winter Storm*.

Finally, in *Marco Polo*, Judge Koeltl recently required a "plausible" showing that defendant's funds

were actually passing through Southern District of New York, as opposed to hypothetically passing through the Southern District. *See* 2009 U.S. Dist. LEXIS 19057, at *4. Judge Koeltl noted that "[t]he fact that the defendant is still actively doing business and at some point in the past has conducted its business in United States dollars may mean that the defendant could transfer funds through a New York bank in the future, but it hardly makes it plausible that it actually will." *Id.* at *5. By requiring more than a hunch to obtain an attachment, Judge Koeltl further limited the usefulness of attachment of EFTs sanctioned by *Winter Storm*.

Taken together, these cases may have limited the practical usefulness of our holding in Winter Storm to plaintiffs and thus may also have reduced the practical effects of overturning that decision. This is not to say that we take our decision to overturn Winter Storm lightly but, rather, that we seek to allay any concerns that the decision in this case is wholly unanticipated, surprising, or disruptive to ongoing financial practices. In doing so, we recognize a trend toward limiting maritime attachments of EFTs in our Circuit and take this opportunity to definitively untangle the doctrinal knot created by Winter Storm and its progeny.

BACKGROUND

In this action, plaintiff The Shipping Corporation of India, Ltd. Click for Enhanced Coverage Linking Searches ("SCI" or "plaintiff") appeals from a June 27, 2008 order of the United States District Court for the

Southern District of New York (Jed S. Rakoff, *Judge*) insofar as it vacated portions of an order of maritime attachment and garnishment (the "attachment") entered by the District Court on May 7, 2008, pursuant to Rule B. Specifically, the June 2008 order vacated the attachment of EFTs sent from third parties not involved in this litigation to defendant Jaldhi Overseas Pte Ltd. ("Jaldhi" or "defendant") in the amount of $ 3,533,522.

Jaldhi cross-appeals from the same June 27, 2008 order insofar as it denied Jaldhi's motion for counter-security for various counterclaims to be arbitrated in London on the ground that SCI, as an alleged instrumentality of the government of India, was entitled to immunity from pre-judgment attachment under the Foreign Sovereign Immunity Act, 28 U.S.C. §§ 1602-1611 ("FSIA").

On appeal, the parties raise the following issues: (1) whether EFTs of which a defendant is the beneficiary are attachable property of that defendant under our decisions in *Winter Storm*, 310 F.3d 263, *Aqua Stoli*, 460 F.3d 434, and *Consub Delaware*, 543 F.3d 104; and (2) whether SCI is entitled to immunity under the FSIA from pre-judgment attachment of security for Jaldhi's counterclaims to be arbitrated in London.

The relevant factual and procedural history is as follows. In March 2008, SCI chartered its vessel *M/V Rishikesh* (the "vessel") to defendant to transport iron

ore from India to China.[4] Specifically, the charter provided that SCI was to deliver the vessel to Jaldhi on March 29, 2008, "with hull, machinery, and equipment in a thoroughly efficient state." The vessel was delivered to Jaldhi on March 29, 2008, in compliance with the terms of the charter. While in port in Kolkata, India the next day, a crane on board the vessel collapsed, killing the crane operator, halting cargo operations, and causing Jaldhi to place the vessel "off hire," *i.e.*, to suspend the charter.

On May 2, 2008, SCI issued an invoice to Jaldhi seeking payment of Jaldhi's unpaid balance of $3,608,445. After not receiving payment, SCI filed a complaint in the District Court seeking an *ex parte* maritime attachment pursuant to Rule B of the Admiralty Rules on May 7, 2008 for the balance, interest, and attorneys' fees for a total of $4,816,218. According to SCI, the vessel came back "on hire" on April 13, 2008, when its cranes passed safety inspections, and therefore Jaldhi owes payments under the charter from that date forward. On May 8, 2008, the District Court entered an ex parte order of Maritime Attachment and Garnishment in the amount of $4,816,218 and noted in its order that the attachment applied

> against all tangible or intangible property belonging to, claimed by or being held for the

4. Although the charter commits the parties to resolve any disputes under English law and by arbitration in London, it is unclear from the record and briefs whether any arbitrations in London were commenced or are ongoing.

> Defendant by any garnishees within this District, including but not limited to electronic fund transfers originated by, payable to, or otherwise for the benefit of Defendant, whether to or from the garnishee banks or any other electronic funds transfers . . . .

J.A. 15. SCI then filed an amended complaint on May 15, 2008, to adjust the amount attached to reflect additional fees and a $ 1,260,585 payment from Jaldhi to SCI, bringing the total attachment to $4,689,247. On May 22, 2008, Jaldhi filed a motion to vacate the attachment pursuant to Rule E of the Admiralty Rules[5] and sought counter-security against SCI to cover any damages resulting from the crane accident. By that date, SCI had attached EFTs in the amount of $4,873,404.90. EFTs where defendant was the beneficiary comprised $ 4,590,678.60 of the total amount attached, with the remainder consisting of EFTs where

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5. Rule E of the Admiralty Rules states, in relevant part:

> Whenever property is arrested or attached, any person claiming an interest in it shall be entitled to a prompt hearing at which the plaintiff shall be required to show why the arrest or attachment should not be vacated or other relief granted consistent with these rules.

Fed. R. Civ. P. Supp. R. E(4)(f).

defendant was the originator.[6] The parties then worked together to release any funds attached in excess of the amount provided in the attachment order.

In a Memorandum Order dated June 27, 2008, Judge Rakoff vacated his May 8, 2008 attachment order insofar as it applied to EFTs of which defendant was the beneficiary. *See Shipping Corp. of India, Ltd. v. Jaldhi Overseas PTE Ltd.*, No. 08 Civ. 4328, 2008 U.S.

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6. Specifically, EFTs from and to the following parties were seized while they briefly passed through the computer systems of banks located in the Southern District of New York:

Originator	*Beneficiary*	*Amount Restrained*
Sesa Goa Ltd.	Jaldhi Overseas Ltd.	$ 2,377,533.90
Sarat Chatterjee & Co.	Jaldhi Overseas Ltd.	$ 1,399,960.00
Sarat Chatterjee & Co.	Jaldhi Overseas Ltd.	$ 449,960.00
Sarat Chatterjee & Co.	Jaldhi Overseas Ltd.	$ 269,363.72
Bhusan Power & Steel Ltd.	Jaldhi Overseas Ltd.	$ 93,861.00
		$ 4,590,678.60
Jaldhi Overseas Ltd.	Bridge Oil Ltd.	$ 282,726.35
	Total	$ 4,873,404.90

J.A. 32.

Dist. LEXIS 49209, at *5 (S.D.N.Y. June 27, 2008). Judge Rakoff based his decision to vacate the attachment order on his own prior decision in *Seamar Shipping Corp. v. Kremikovtzi Trade Ltd.*, 461 F. Supp. 2d 222 (S.D.N.Y. 2006), in which he had concluded that EFTs en route to a defendant were not attachable under Rule B. *See Shipping Corp. of India*, 2008 U.S. Dist. LEXIS 49209, at *1-2. He also concluded that SCI was entitled to sovereign immunity under the FSIA, although he did not make any specific findings regarding SCI's sovereign status. *Id.* at * 3. Noting, however, that there were differing opinions among judges of the Southern District of New York regarding the attachment of EFTs where the defendant is the beneficiary of the transfer, Judge Rakoff certified the matter for appellate review pursuant to 28 U.S.C. § 1292(b).[7] *Id.* at *2-3 ("Because

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7. This statute states:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided*, however, That application for an appeal hereunder shall not stay

(Cont'd)

the determination to vacate the attachment clearly involves a controlling question of law as to which there is substantial ground for difference of opinion, and because an immediate appeal from the order may materially advance the ultimate termination of the litigation, the Court hereby certifies the vacatur for interlocutory appeal . . . ." (internal quotation marks and citation omitted)).

DISCUSSION

A. Standard of Review

We generally review a district court's decision to vacate a maritime attachment for "abuse of discretion." *See, e.g., Consub Del.*, 543 F.3d at 108; *cf. Sims v. Blot*, 534 F.3d 117, 132 (2d Cir. 2008) ("A district court has abused its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence, or rendered a decision that cannot be located within the range of permissible decisions." (internal quotation marks, citation, and alterations omitted) (emphasis added)). Because the District Court made a threshold ruling of law before exercising its discretion, our review is *de novo*. *See Aqua Stoli*, 460 F.3d at 439.

(Cont'd)

> proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

28 U.S.C. § 1292(b).

B. EFTs as Attachable Property

Rule B of the Admiralty Rules permits attachment of "the defendant's tangible or intangible personal property." Fed. R. Civ. P. Supp. R. B(1)(a).[8] From a plain reading of the text, it is clear that to attach an EFT under Rule B, the EFT must both (1) be "tangible or intangible property" and (2) be the "defendant's." *Id.*

Before we can reach the question presented squarely in this appeal—whether an EFT is defendant's property when defendant is the beneficiary of that EFT—we must first consider the threshold issue of whether EFTs are indeed "defendant's" property subject at all to attachment under the Admiralty Rules. We first held that EFTs were in fact attachable property under Rule B seven years ago in Winter Storm. Although we have subsequently applied Winter Storm in numerous cases, *see, e.g.*, *Consub Del.*, 543 F.3d 104; *Aqua Stoli*, 460 F.3d 434, we now conclude, as noted earlier, that Winter Storm was erroneously decided and should no longer be binding precedent in this Circuit.

We readily acknowledge that a panel of our Court is "bound by the decisions of prior panels until such time as they are overruled either by an en banc panel of our Court or by the Supreme Court," *United States v. Wilkerson*, 361 F.3d 717, 732 (2d Cir. 2004), and thus that it would ordinarily be neither appropriate nor

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8. For a brief overview of the history and purpose of maritime attachments, *see Aqua Stoli*, 460 F.3d at 437-38.

possible for us to reverse an existing Circuit precedent. In this case, however, we have circulated this opinion to all active members of this Court prior to filing and have received no objection. *See, e.g., United States v. Crosby*, 397 F.3d 103, 105 n.1 (2d Cir. 2005); *Jacobson v. Fireman's Fund Ins. Co.*, 111 F.3d 261, 268 n.9 (2d Cir. 1997).[9]

Our reasons for reversing a relatively recent case are twofold. First, and most importantly, we conclude that the holding in *Winter Storm* erroneously relied on *Daccarett*, 6 F.3d 37, to conclude that EFTs are attachable property. *Winter Storm*, 310 F.3d at 276-78. Second, as noted above, the effects of *Winter Storm* on the federal courts and international banks in New York are too significant to let this error go uncorrected simply to avoid overturning a recent precedent.

Beginning in Winter Storm, we have held that "EFT funds in the hands of an intermediary bank" are "subject to Admiralty Rule B attachment." *Id.* at 278. In that case, plaintiff sought to attach an EFT that originated in defendant's account with the Bank of Ayudhya—based in Bangkok, Thailand—while it was en route to a third party who maintained an account with the Royal

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9. We refer to this process as a "mini-en banc." *See United States v. Parkes*, 497 F.3d 220, 230 n.7 (2d Cir. 2007); *see also* Jon O. Newman, *The Second Circuit Review—1987-1988 Term: Foreword: In Banc Practice in the Second Circuit, 1984-1988, 55 Brook. L. Rev. 355, 367-68 (1989)* (noting that judges will occasionally circulate particularly important panel opinions before filing).

Bank of Scotland in London. *Id.* at 266. The EFT passed through the Bank of New York—the "intermediary bank"—which is headquartered in Manhattan. *Id.* The District Court vacated the attachment of the EFT because, in its view, the EFT was not "property" within the meaning of Rule B. *Id.* at 267. Specifically, she concluded that there was no federal law on point and that state law—New York's version of the Uniform Commercial Code—forbade courts from attaching funds in an intermediary bank. *See id.*; *see also* N.Y. U.C.C. § 4-A-503.

On appeal, a panel of our Court concluded that relevant federal law indicated that EFTs were indeed "property" that could be attached in a Rule B proceeding and therefore recourse to state law was unnecessary. *Winter Storm*, 310 F.3d at 278. In a comprehensive opinion, Judge Haight, sitting by designation, offered three reasons to support this decision.

First, the panel observed that Rule B itself—which covers "defendant's tangible or intangible personal property," Fed. R. Civ. P. Supp. R. B(1)(a)—is written in very broad language. "It is difficult to imagine words more broadly inclusive than 'tangible or intangible.' . . . The phrase is the secular equivalent of the creed's reference to the maker 'of all there is, seen and unseen.'" *Winter Storm*, 310 F.3d at 276. This broad language, the panel reasoned, sweeps sufficiently far to encompass even ephemeral EFTs.

Second, the panel stated that "[t]here is no question that federal admiralty law regards a defendant's bank account as property subject to maritime attachment under Rule B." *Id.* (emphasis added). By extension, the panel reasoned, "[we are un]able to discern in admiralty law or elsewhere a basis for regarding [the defendant's] funds in [the intermediary bank's] hands prior to their electronic transfer to [the beneficiary] as anything other than the funds held by [the intermediary bank] for the account of [the defendant]." *Id.* Since a defendant's bank account was attachable property, the panel reasoned, the effectively equivalent EFTs should also be attachable property of the defendant.

Third, the panel observed that in *Daccarett* we had upheld the seizure of EFTs that passed through intermediary banks in New York City, where the EFTs were used by a Colombian criminal cartel to transfer funds from accounts in Luxembourg to accounts in Panama and Colombia. 6 F.3d at 44, 54; *see also id.* at 55 (holding that "an EFT while it takes the form of a bank credit at an intermediary bank is clearly a seizable res under the forfeiture statutes"). The seizures in that criminal case were made pursuant to 21 U.S.C. § 881, a penal statute which borrows the procedures for asserting maritime liens under Admiralty Rule C.[10] The

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10. 21 U.S.C. § 881 states, in relevant part:

> (a) The following shall be subject to forfeiture to the United States and no property right shall exist in them:

(Cont'd)

panel reasoned that there was "no principled basis" for applying the procedures outlined in Admiralty Rule C to a seizure of an EFT in a forfeiture action, but not to a maritime attachment under Rule B. *Winter Storm*, 310 F.3d at 278.

Relying on these three reasons—each of which was based on federal law—the Winter Storm panel concluded that "EFT funds in the hands of an intermediary bank may be attached pursuant to Admiralty Rule B(1)(a)." *Id.* Accordingly, the panel had no occasion to look to state

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(Cont'd)

. . . .

> (6) All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance or listed chemical in violation of this subchapter, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this subchapter.
>
> 21 U.S.C. § 881(a)(6); see also id. § 881(b) (requiring property to be seized "in the manner set forth in [18 U.S.C. § 981(b)]"); 18 U.S.C. § 981(b)(2)(A) (permitting a seizure without a warrant where "a complaint for forfeiture has been filed in the United States district court and the court issued an arrest warrant in rem pursuant to the Supplemental Rules for Certain Admiralty and Maritime Claims").

law, as Judge Scheindlin had done, to determine whether EFTs were attachable.[11] *Id.*

Upon further consideration, we find Winter Storm's reasons unpersuasive and its consequences untenable. Most importantly, we find that *Winter Storm*'s reliance on Daccarett was misplaced. *Daccarett* did not decide that the originator or beneficiary of an EFT had a property interest in the EFT; it held only that funds traceable to an illegal activity were subject to forfeiture under 21 U.S.C. § 881. *See Aqua Stoli*, 460 F.3d at 445 n.6 ("Because Daccarett was a forfeiture case, its holding that EFTs are attachable assets does not answer the more salient question of whose assets they are while in transit."). Under the forfeiture laws, funds can be seized even if they do not constitute property of the defendant because "no property right shall exist in . . . [all] moneys . . . traceable to [a violation of Title 21, Chapter 13, Subchapter I of the United States Code]." 21 U.S.C. § 881(a). To be eligible for forfeiture, the EFTs needed only to be traceable to the illegal activities, and thus the court in Daccarett was required only to assess whether the EFTs in that case were in fact traceable to illegal activities. No further inquiry into the identity of the owner of the EFTs was necessary—indeed, that question was wholly irrelevant.

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11. Although the panel did briefly discuss New York law, it concluded that New York law was not controlling because federal law—particularly *Daccarett*—adequately defined the contours of Rule B. *See Winter Storm*, 310 F.3d at 279.

For maritime attachments under Rule B, however, the question of ownership is critical. As a remedy quasi in rem, the validity of a Rule B attachment depends entirely on the determination that the res at issue is the property of the defendant at the moment the res is attached. *See, e.g., Transportes Navieros y Terrestres S.A. de C.V. v. Fairmount Heavy Transp. N.V.*, 572 F.3d 96, 108 (2d Cir. 2009). Because a requirement of Rule B attachments is that the defendant is not "found within the district," the res is the only means by which a court can obtain jurisdiction over the defendant.[12] If the res is not the property of the defendant, then the court lacks jurisdiction. In contrast, civil forfeiture is a remedy in rem. In rem jurisdiction is based on the well-established theory that the "thing is itself treated as

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12. The "jurisdiction" at issue in a Rule B attachment proceeding is quasi in rem, rather than *in personam* or *in rem*. In Rule B attachment proceedings, jurisdiction is predicated on the presence within the court's territorial reach of property in which the Rule B defendant has an interest. *See Black's Law Dictionary* 857 (7th ed. 1999) (defining *quasi in rem* as "[j]urisdiction . . . based on [a] person's interest in property located within the court's territory"); *see also* Restatement (Second) of Judgments § 6 cmt. a, at 73; *id.* § 8 cmt. a, at 83–84. Because of the requirement that the defendant not be "found" within the district where the action is brought, Fed. R. Civ. P. Supp. R. B(1)(a), Rule B contemplates that a court will lack in personam jurisdiction over the defendant when it orders that a writ of attachment be issued. In such a proceeding, the court's coercive authority is coterminous with the scope of its jurisdiction, and limited to the extent of the defendant's interest in the attached property; that authority does not extend to the exercise of *in personam* jurisdiction over a Rule B defendant.

the offender and made the defendant by name or description." *California v. Deep Sea Research, Inc.*, 523 U.S. 491, 501, 118 S. Ct. 1464, 140 L. Ed. 2d 626 (1998). Thus, for in rem remedies such as forfeitures, ownership of the res is irrelevant, as the court has personal jurisdiction regardless of who owns the res at issue. Although not considered by the *Winter Storm* panel, this distinction provides, in our view, a principled basis for allowing EFTs to be subject to forfeiture but not attachment. In sum, Daccarett provides no persuasive guidance on the validity of Rule B attachments of EFTs and should not serve as the foundation for a rule that allows the attachment of EFTs under Rule B.

Without the support of *Daccarett*, HN9Go to the description of this Headnote.we are unpersuaded that either the text of Rule B or our past maritime holdings relating to defendants' bank accounts compel us to conclude as a matter of federal law that an EFT is "*defendant's* . . . personal property." Fed. R. Civ. P. Supp. R. B(1)(a) (emphasis added). Moreover, we are unaware of any historical rationale that justifies the extension of federal maritime common law to support the Rule B practices that have taken place under the rule of *Winter Storm*. One of the primary grounds for the historical development of Rule B attachments was that "[a] ship may be here today and gone tomorrow." *Polar Shipping Ltd. v. Oriental Shipping Corp.*, 680 F.2d 627, 637 (9th Cir. 1982); *see also Schiffahartsgesellschaft Leonhardt & Co. v. A. Bottacchi S.A. De Navegacion*, 732 F.2d 1543, 1547 (11th Cir. 1984) (noting that a "relevant commercial . . . consideration[]" relating to Rule B practices is that

"a ship's ability to dock, unload cargo, and fill its hold with goods intended for another destination—all within twenty four hours—imposes tremendous pressure on creditors desiring to attach a vessel or property located aboard"). EFTs, like ships in a port, are transitory. Streamlined Rule B practices, however, developed out of the concern that ships might set sail quickly, not because the courts intended to arm maritime plaintiffs with writs of attachment prior to the arrival of the ship in port. Under Winter Storm, however, maritime plaintiffs now seek writs of attachment pursuant to Rule B long before the defendant's property enters the relevant district, often based solely on the speculative hope or expectation that the defendant will engage in a dollar-denominated transaction that involves an EFT during the period the attachment order is in effect. *See, e.g., TJ Shipping & Logistics v. Havi Ocean, LLC*, No. 09 Civ. 1555, 2009 U.S. Dist. LEXIS 14870, 2009 WL 454137, at *2-3 (S.D.N.Y. Feb. 19, 2009). Such practices, which have increased dramatically since *Winter Storm*, bear little, if any, relation to the text of Rule B or to our jurisprudence relating to the bank accounts of maritime defendants.

When there is no federal maritime law to guide our decision, we generally look to state law to determine property rights. *See, e.g., Reibor*, 759 F.2d at 266 (citing *California ex rel. State Lands Comm'n v. United States*, 457 U.S. 273, 283, 102 S. Ct. 2432, 73 L. Ed. 2d 1 (1982)) (considering state law where federal admiralty law is "thin" and "a decision . . . contrary to the general rule of the state might have disruptive consequences for the

state banking system" (internal quotation marks omitted)). Accordingly, we now look to state law to determine whether EFTs can be considered a "defendant's" property for purposes of attachment under Rule B.

New York State does not permit attachment of EFTs that are in the possession of an intermediary bank. Specifically, New York law states that HN12Go to the description of this Headnote."a court may restrain . . . the beneficiary's bank from releasing funds to the beneficiary or the beneficiary from withdrawing the funds." N.Y. U.C.C. § 4-A-503; *see also id.* § 4-A-503 cmt. 1 ("After the funds transfer is completed by acceptance of a payment order by the beneficiary's bank, [the beneficiary's] bank can be enjoined from releasing funds to the beneficiary or the beneficiary can be enjoined from withdrawing funds.").

As for those interested in obtaining the originator's funds, New York law is also clear. Specifically, a court may restrain . . . an originator's bank from executing the payment order of the originator." *Id.* § 4-A-503; *see also id.* § 4-A-502 cmt. 4 ("A creditor of the originator can levy on the account of the originator in the originator's bank before the funds transfer is initiated. . . . The creditor of the originator cannot reach any other funds because no property of the originator is being transferred." (emphases added)). Apart from these injunctions, "[a] court may not otherwise restrain [any activity] with respect to a funds transfer." *Id.* § 4-A-503;

see also European Am. Bank v. Bank of N.S., 12 A.D.3d 189, 784 N.Y.S.2d 99, 100-01 (1st Dep't 2009) (noting that attachments served on intermediary banks cannot be enforced); N.Y. U.C.C. § 4-A-503 cmt. 1 ("No other injunction is permitted. In particular, intermediary banks are protected. . . ." (emphases added)).

Finally, an authoritative comment accompanying the New York Uniform Commercial Code states that a beneficiary has no property interest in an EFT because "until the funds transfer is completed by acceptance by the beneficiary's bank of a payment order for the benefit of the beneficiary, *the beneficiary has no property interest in the funds transfer* which the beneficiary's creditor can reach." N.Y. U.C.C. § 4-A-502 cmt. 4 (emphasis added); *cf. Sigmoil Res., N.V. v. Pan Ocean Oil Corp. (Nigeria)*, 234 A.D.2d 103, 650 N.Y.S.2d 726, 727 (1st Dep't 1996) ("Neither the originator who initiates payment nor the beneficiary who receives it holds title to the funds in the account at the correspondent bank."). Taken together, these provisions of New York law establish that EFTs are neither the property of the originator nor the beneficiary while briefly in the possession of an intermediary bank.

Because EFTs in the temporary possession of an intermediary bank are not property of either the originator or the beneficiary under New York law, they cannot be subject to attachment under Rule B. As stated earlier, Rule B allows attachment only of "defendant's . . . property." Fed. R. Civ. P. Supp. R. B(1)(a) (emphasis added). If the EFTs are not the property of either the

originator or the beneficiary, then they cannot be "defendant's . . . property" and therefore are not subject to Rule B attachment.[13]

In sum, because there is no governing federal law on the issue and New York law clearly prohibits attachment of EFTs, we conclude that EFTs being processed by an intermediary bank in New York are not subject to Rule B attachment. Accordingly, we conclude that the District Court did not err in vacating the portions of the order in this action affecting EFTs of which defendant was the beneficiary. We remand the cause to the District Court with directions to consider whether there are grounds for not vacating the remaining portions of the attachment order affecting EFTs of which defendant was the originator.

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13. If it is argued that property rights must vest in some entity at all times, then perhaps New York law envisages EFTs as the property of the intermediary bank for the short while or instant during which they remain in the bank's possession. Because this question is not presented in this case, we need not address it here. If, however, a court were to find that the EFTs were property of the intermediary bank, it would have no effect on the application of Rule B. If EFTs are the property of the intermediary bank and that bank is a defendant for purposes of Rule B, then the property would still not be subject to Rule B attachment because these intermediary banks are necessarily "found within the district" in which the EFTs are found and Rule B only allows the attachment of property within the district that belongs to defendants "not found within the district." Fed. R. Civ. P. Supp. R. B(1)(a).

C. Sovereign Immunity

Because it is probable that on remand the District Court will vacate the May 8, 2008 attachment order in its entirety, we decline to consider the second argument on appeal—whether the District Court erred in denying Jaldhi's motion for counter-security on the ground that SCI was a sovereign instrumentality. Without briefing before us on the issue, we leave it to the District Court to determine if Jaldhi's motion for counter-security should be denied as moot. If it is not moot, the District Court is directed to give plenary reconsideration to the claim of sovereign immunity made by SCI, with such jurisdictional discovery as may be appropriate in the circumstances. *See generally First City, N.A. v. Rafidain Bank*, 150 F.3d 172, 176-77 (2d Cir. 1998) [G]enerally a plaintiff may be allowed limited discovery with respect to the jurisdictional issue [in actions where FSIA applies.]" (internal quotation marks omitted)).

CONCLUSION

In summary, we hold the following:

(1) We overrule our previous decision in Winter Storm, 310 F.3d 263, and conclude that EFTs being processed by an intermediary banks are not subject to attachment under Rule B.

(2) In accordance with our conclusion that such EFTs are not subject to attachment, we AFFIRM the June 27, 2008 order of the District Court insofar as it

vacated the portions of the May 8, 2008 attachment order that affect EFTs of which defendant is the beneficiary and we REMAND the cause to the District Court with directions to consider whether there are other grounds for not vacating the remaining portion of the attachment order that affects EFTs of which defendant is the originator.

(3) Finally, we VACATE the June 27, 2008 order of the District Court insofar as it denied Jaldhi's motion for counter-security and REMAND the cause to the District Court to consider whether to dismiss that motion.

The mandate shall issue forthwith. Each party shall bear its own costs.

APPENDIX B — MEMORANDUM ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK FILED JUNE 27, 2008

UNITED STATES DISTRICT COURT
S.D. NEW YORK

No. 08 Civ. 4328 (JSR)

THE SHIPPING CORPORATION OF INDIA, LTD.,

Plaintiff,

-v-

JALDHI OVERSEAS PTE LTD.,

Defendant.

June 27, 2008

MEMORANDUM ORDER

JED S. RAKOFF, District Judge.

In this maritime action, defendant Jaldhi Overseas PTE Ltd. ("Jaldhi") moves (1) to vacate those portions of the attachment of property by plaintiff The Shipping Corporation of India, Ltd. ("SCI") that consist of those electronic funds transfers ("EFTs") from third parties of which Jaldhi was the intended beneficiary but not yet the recipient, and (2) for counter-security for any putative recovery by Jaldhi on Jaldhi's counterclaims

against SCI. For the reasons set forth below, Jaldhi's motion to vacate portions of SCI's attachment is granted, but the vacatur is stayed for 90 days so that SCI can pursue interlocutory appeal; and Jaldhi's motion for counter-security is denied.

As this Court has previously explained, an attachment pursuant to Rule B of the Supplemental Rules for Certain Admiralty and Maritime Claims only applies to a defendant's property, and EFTs directed by third parties to a defendant do not become the defendant's property until the transfer is completed. *See Seamar Shipping Corp. v. Kremikovtzi Trade Ltd.*, 461 F. Supp. 2d 222 (S.D.N.Y. 2006). Hence, those EFTs from third parties that were attached before the transfer to the intended beneficiary, Jaldhi, had been completed cannot be attached pursuant to Rule B, and their attachment must be vacated.

Recognizing that this outcome was likely in light of *Seamar*, a decision of this Court with which some other courts have disagreed, *see Compania Sudamericana de Vapores S.A. v. Sinochem Tianjin Co.*, No. 06 Civ. 13765, 2007 U.S. Dist. LEXIS 24737, 2007 WL 1002265, *4 (S.D.N.Y. Apr. 4, 2007) (collecting cases), SCI's counsel, at oral argument of this motion, *see* transcript, 6/25/08, requested that the Court, if it granted vacatur, certify the case for interlocutory appeal pursuant to 28 U.S.C. § 1292(b) and stay the vacatur pending such appeal. Because the determination to vacate the attachment clearly "involves a controlling question of law as to which there is substantial ground for difference

of opinion," and because "an immediate appeal from the order may materially advance the ultimate termination of the litigation," 28 U.S.C. § 1292(b), the Court hereby certifies the vacatur for interlocutory appeal and stays the vacatur for 90 days so that plaintiff can pursue such an appeal on an expedited basis.

As to Jaldhi's motion for counter-security, however, the Court denies the motion because SCI has immunity from pre-judgment attachment under the Foreign Sovereign Immunity Act, 28 U.S.C. §§ 1602-1611.

SCI asserts that it is an instrumentality of the Government of India, *see, e.g., Williams v. The Shipping Corp. of India*, 653 F.2d 875, 876 (4th Cir. 1981), and hence entitled to immunity from suit except to the extent waived. SCI admits that, by bringing this action, it has waived its immunity from counterclaims, at least in the circumstances here presented. *See* § 1607(b)-(c); transcript, 6/25/08.

The Second Circuit, however, treats pre-judgment security for claims against a sovereign as a form of "attachment." *See, e.g., British Int'l Ins. Co. v. Seguros La Republica, S.A.*, 212 F.3d 138, 141-42 (2d Cir. 2000); *Stephens v. Nat'l Distillers & Chem. Corp.*, 69 F.3d 1226, 1229-30 (2d Cir. 1995). 28 U.S.C. § 1609 grants immunity from attachment to a sovereign instrumentality, subject only to the exceptions set forth in 28 U.S.C. §§ 1610 and 1611. But the only such exception to pre-judgment attachment predicated on waiver requires that such waiver be made "explicitly." § 1610(d)(1). Unlike a waiver

of a foreign state's immunity from attachment in aid of execution, which can be waived implicitly, "the immunity from *prejudgment attachment* [under § 1610(d)] can be waived only by *unmistakable and plain language*." *S&S Mach. Co. v. Masinexportimport*, 706 F.2d 411, 416 (2d Cir. 1983) (second emphasis added). "[A] waiver of immunity from prejudgment attachment must be explicit in the common sense meaning of that word: 'the asserted waiver must demonstrate unambiguously the foreign state's intention to waive its immunity from prejudgment attachment in this country.'" *Banco de Seguros del Estado v. Mut. Marine Office, Inc.*, 344 F.3d 255, 261 (2d Cir. 2003) (quoting *S&S Mach.*, 706 F.2d at 416); *see also Libra Bank Ltd. v. Banco Nacional de Costa Rica, S.A.*, 676 F.2d 47, 49 (2d Cir. 1982). Neither SCI's susceptibility to counterclaims under § 1607 nor SCI's attachment of Jaldhi's funds amounts to an "unmistakable," "clear and unambiguous" waiver of SCI's immunity to pre-judgment attachment, and hence Jaldhi's motion for counter-security must be denied.

Accordingly, the Court hereby (a) grants Jaldhi's motion to vacate that portion of the funds attached by SCI that consists of EFTs still en route to Jaldhi, stays the vacatur for 90 days, and certifies that portion of this Memorandum Order for interlocutory appeal; and (b) denies Jaldhi's motion for counter-security. The Clerk of the Court is directed to close document number 7 in the Court's docket.

SO ORDERED.

APPENDIX C — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK FILED NOVEMBER 20, 2006

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

06 Civ. 5507 (JSR)

SEAMAR SHIPPING CORPORATION,

Plaintiff,

-v.-

KREMIKOVTZI TRADE LTD. AND KREMIKOVTZI CORPORATION,

Defendants.

November 17, 2006, Decided
November 20, 2006, Filed

OPINION BY: JED S. RAKOFF

OPINION

OPINION AND ORDER

JED S. RAKOFF, U.S.D.J.

By Order dated November 14, 2006, the Court granted the motion of intervenor GSHL Bulgaria S.A. ("GSHL") to vacate the Court's *Ex Parte* Order of

Appendix C

Maritime Attachment, dated July 21, 2006, which restrained $ 243,004.87 in funds that were involved in an Electronic Funds Transfer ("EFT") routed through an intermediary bank in this District. This Opinion and Order will state the reasons for that determination and initiate further proceedings in this case.

For purposes of this motion, the pertinent facts are undisputed. Plaintiff Seamar Shipping Corporation is a company organized under the laws of Liberia and owner of the vessel M.V. Agios Raphael (the "Vessel"). Complaint P 2. By charter party dated February 11, 2004, plaintiff chartered the Vessel to defendants Kremikovtzi Trade Ltd. and Kremikovtzi Corporation (two Bulgarian companies here collectively called "Kremikovtzi") for the carriage of a cargo of bulk coal from Mobile to Bulgaria. *Id.* P 4. Although the Vessel completed its discharge at Bulgaria, plaintiff asserts that the Vessel was twice delayed — once while loading in Mobile and once while discharging in Bulgaria — and was thus on demurrage for some five days during the voyage. *Id.* PP 6-7. Plaintiff asserts that its total claim against Kremikovtzi is for $ 243,004.87. *Id.* P 12.

Plaintiff filed the instant action on July 21, 2006, together with an *ex parte* application for an order permitting it to attach any property held by Kremikovtzi in this District up to the sum of $ 243,004.87. In accordance with Rule B(1)(a) of the Supplemental Rules for Certain Admiralty and Maritime Claims ("Admiralty

Rules"), the Order was granted subject to being thereafter contested by Kremikovtzi.[1]

The attached funds were part of an EFT of $ 1,213,989.92 from intervenor GSHL's account at The Bank of New York's London branch to another GSHL account at UBS Bank's branch in Lugano, Switzerland. Harter Aff. P 6. The transfer was denominated in United States Dollars and thus had to be routed through an intermediary bank in the United States. *Id.* P 7. The funds were routed through UBS's branch in New York, where the attachment occurred. *Id.*

On October 3, 2006, intervenor GSHL made a restricted appearance in the instant case, pursuant to Rule E(8) of the Admiralty Rules, to contest the attachment. GSHL argued that when The Bank of New York 's London branch issued transfer instructions for the EFT requested by GSHL, the instructions misstated the account holder at the receiving bank as being Kremikovtzi, rather than the actual holder, GSHL. Harter Aff. P 8. In addition, GSHL argued that the

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1. Additionally, in an action before Judge Marrero, *Phoenix Bulk Carriers Ltd. v. Kremikovtzi Trade Ltd.*, 05 Civ. 9559, plaintiff obtained an order attaching $ 883,717.24 of Kremikovtzi's funds, Affirmation of Simon Harter dated October 17, 2006 ("Harter Aff."), at PP 2, 4, and the plaintiffs in two other actions that were subsequently consolidated with *Phoenix Bulk — Fino Marine S.A. v. Kremikovtzi Trade Ltd.*, 05 Civ. 10320 and *D'Amato Fratelli Spa v. Kremikovtzi Trade*, 05 Civ. 10585 — obtained attachments of those same funds in equal or lesser amounts. Harter Aff. P 3.

Court should vacate the attachment because, regardless of whether GSHL or Kremikovtzi was the intended beneficiary of the EFT, the funds were not the property of either party while in transit and thus were not subject to attachment under Admiralty Rule B(1)(a). It was on the basis of this latter argument that the Court granted the motion to vacate the attachment.

The analysis begins with the text of Rule B(1)(a), which permits attachment, where "a defendant is not found within the district," of "the defendant's tangible or intangible personal property," limited only by "the amount sued for." In order to attach an EFT under this rule, it must be both "tangible or intangible property" *and* "defendant's" property.

In *Winter Storm Shipping, Ltd. v. TPI*, 310 F.3d 263, 278 (2d Cir. 2002), the Court of Appeals stated that "EFT funds in the hands of an intermediary bank" qualify as "tangible or intangible property" subject to attachment under Rule B(1)(a). *Winter Storm* purported to ground this statement on "the broad, inclusive language of Admiralty Rule B(1)(a)," *id.*, and on the EFT analysis in *United States v. Daccarett*, 6 F.3d 37 (2d Cir. 1993), a civil forfeiture action under federal drug laws, in which the Second Circuit held that "an EFT while it takes the form of a bank credit at an intermediary bank is clearly a seizable *res* under the forfeiture statutes," 6 F.3d at 55.

The Second Circuit has not spoken with one voice, however, on whether an EFT in the hands of an

intermediary bank can be said to be a "defendant's" property, where the defendant is either the originator or the intended beneficiary of the EFT. In *Winter Storm*, the Court of Appeals did not address this question explicitly. Still, because *Winter Storm* instructed the district court to reinstate the attachment at issue, that decision has been construed to hold that the EFT at issue was the property of the defendant — who was the originator of the EFT, *see* 310 F.3d at 266 — under Rule B(1)(a). *See, e.g., HBC Hamburg Bulk Carriers GMBH & Co. KG v. Proteinas y Oleicos S.A. de C.V.*, 2005 U.S. Dist. LEXIS 8009, 2005 WL 1036127, at *4 (S.D.N.Y. 2005). However, in *Aqua Stoli Shipping Ltd. v. Gardner Smith Pty Ltd.*, 460 F.3d 434 (2d Cir. 2006), the Second Circuit questioned the continued validity of *Winter Storm*'s implicit holding on this point:

> The correctness of our decision in *Winter Storm* seems open to question, especially its reliance on *Daccarett*, 6 F.3d at 55, to hold that EFTs are property of the beneficiary or sender of an EFT. Because *Daccarett* was a forfeiture case, its holding that EFTs are attachable assets does not answer the more salient question of *whose* assets they are while in transit. In the absence of a federal rule, we would normally look to state law, which in this case would be the New York codification of the Uniform Commercial Code, N.Y. U.C.C. Law §§ 4-A-502 to 504. Under state law, the EFT could not be attached because EFTs are property of neither the sender nor the

> beneficiary while present in an intermediary bank. *Id.* §§ 4-A-502 cmt. 4 , 4-A-504 cmt. 1.

Aqua Stoli, 460 F.3d at 446 n.6 (emphasis in original). This footnote stops short of explicitly overruling *Winter Storm*, but nevertheless it raises a serious question of whether *Winter Storm*'s implicit holding that EFTs may be considered to be a defendant's property while in transit remains good law.[2]

Regardless of whether *Winter Storm* remains good law in general, there is a more narrow question at issue in this case: whether an EFT can be attached under

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2. Like other high authorities, the Court of Appeals sometimes moves in mysterious ways. While it has been said that the Court of Appeals "is bound by a decision of a prior panel unless and until its rationale is overruled, implicitly or expressly, by the Supreme Court or [the Second Circuit Court of Appeals] *en banc*," *United States v. Ianniello*, 808 F.2d 184, 190 (2d Cir. 1986), *rev'd on other grounds*, *United States v. Indelicato*, 865 F.2d 1370 (2d Cir. 1989), nevertheless, on occasion panels of the Second Circuit Court of Appeals have overruled prior decisions after providing notice either to the judges on the panels that issued the prior decisions, *see Burda Media, Inc. v. Viertel*, 417 F.3d 292, 298 & n.5 (2d Cir. 2005), or to all active members of the Court, *see Adeleke v. United States*, 355 F.3d 144, 155 & n.9 (2d Cir. 2004). The opinion in *Aqua Stoli*, however, does not appear to have been circulated to the panel that heard *Winter Storm*, and accordingly it may be doubtful whether *Aqua Stoli* could be considered to have overruled any part of *Winter Storm*. Yet the plain language in the above quoted passage in *Aqua Stoli* indicates that the decision in *Winter Storm* is now "open to question."

Rule B(1)(a) where the defendant is the intended *beneficiary* of the EFT, rather than the originator. In reliance on *Winter Storm*, *Aqua Stoli* stated the broad rule that "EFTs *to or from* a party are attachable by a court as they pass through banks located in that court's jurisdiction." *Aqua Stoli*, 460 F.3d at 436 (emphasis added). This statement suggests that EFTs are attachable while in transit regardless of whether the defendant is the originator or the intended beneficiary of the EFT. In *Winter Storm*, however, the defendant was clearly the originator of the EFT, *see* 310 F.3d at 266, and in *Aqua Stoli*, although the attachment applied to EFTs "to or from" the defendant, neither the court nor the parties addressed whether the funds that were actually attached had been sent to or from the defendant, *see* 460 F.3d 434, 436. Thus, *Aqua Stoli*'s statement that "EFTs to or from a party are attachable by a court," if construed as binding law, would substantially broaden *Winter Storm*'s holding, which technically applies only where the defendant is the originator of the EFT.

Given that *Aqua Stoli* called *Winter Storm* into serious doubt, *see Aqua Stoli*, 460 F.3d at 446 n.6, it would be illogical to construe other statements in *Aqua Stoli* to broaden *Winter Storm*. To the contrary, taken as a whole, *Aqua Stoli* requires this Court to construe *Winter Storm* narrowly. Accordingly, *Winter Storm*'s [HN2]holding that an EFT is the property of an originator while in transit does not imply a corollary rule that the

EFT is also the property of a beneficiary while in transit.[3]

In the instant case, Kremikovtzi is the purported beneficiary of the EFT. Accordingly, neither *Winter Storm* nor *Aqua Stoli* binds this Court in determining whether the instant attachment can stand. These cases do, however, provide meaningful guidance. Both cases provide that state law may be borrowed if there is no federal admiralty law in point on the particular question presented." *Winter Storm*, 310 F.3d at 275; *Aqua Stoli*, 460 F.3d at 446 n.6 ("[i]n the absence of a federal rule, we would normally look to state law"). The Second Circuit has held that looking to state law is "especially appropriate" where "precedent in federal admiralty law is . . . thin," and

> "a decision . . . contrary to the general rule of the state might have disruptive consequences for the state banking system." [*Det Bergenske Dampskibsselskab v. Sabre Shipping Corp.*, 341 F.2d 50, 52-53 (2d Cir. 1965)] (citation omitted). New York being the situs for multiple transactions in world commerce, the New York banking system is particularly vulnerable to such disruption.

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3. Although prior to the decision in *Aqua Stoli*, some courts in this District held, in reliance on *Winter Storm*, that EFTs in transit are attachable property belonging to the intended beneficiary, *see, e.g.*, *HBC Hamburg*, 2005 U.S. Dist. LEXIS 8009, 2005 WL 1036127, at *4, no court has so held since *Aqua Stoli* was decided.

> Often, when a person in one foreign country makes a payment in U.S. dollars to someone in another foreign country, the payment clears through New York. . . . It is only appropriate therefore that we look to the New York law of attachment for guidance.

Reibor Int'l Ltd. v. Cargo Carriers (KACZ-CO.) Ltd., 759 F.2d 262, 266 (2d Cir. 1985).

In the absence of a federal rule governing whether an EFT is the property of an intended beneficiary while in transit, this Court will look to state law for guidance. *Aqua Stoli* identifies the applicable New York law as New York's codification of the Uniform Commercial Code. *See* 460 F.3d 434, at 446 n.6. The New York U.C.C. provides that "*until the funds transfer is completed* by acceptance by the beneficiary's bank of a payment order for the benefit of the beneficiary, *the beneficiary has no property interest in the funds transfer* which the beneficiary's creditor can reach." N.Y. U.C.C. § 4-A-502 cmt. 4 (emphasis added).

The EFT in this case had not been completed when it was attached at UBS's branch in New York, on its way to UBS's branch in Lugano, Switzerland. Harter Aff. PP 6-7. As a result, Kremikovtzi had no property interest in the attached ETF, as Admiralty Rule B(1)(a) requires. Accordingly, the Court, by the Order dated November 14, 2006, granted GSHL's motion to vacate the attachment.

At the time of oral argument on this motion, counsel for plaintiff requested, in the event GSHL prevailed on its motion to vacate, that the Court certify the case for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). *See* Transcript, November 3, 2006, at 13. The determination here reached to vacate the attachment clearly "involves a controlling question of law as to which there is substantial ground for difference of opinion" and "an immediate appeal from the order may materially advance the ultimate termination of the litigation," 28 U.S.C. § 1292(b). Accordingly the Court hereby certifies this Opinion and Order, as well as the Order dated November 14, 2006, for interlocutory appeal.

Such an appeal, even if perfected, does not, however, stay further proceedings, if any, in the underlying case. To ascertain whether there are any such proceedings that must be addressed, the Court hereby orders counsel for each of the parties to jointly telephone Chambers by no later than November 22, 2006, so that the Court may determine how best to proceed.

SO ORDERED.

JED S. RAKOFF, U.S.D.J.

Dated: New York, New York

November 17, 2006

APPENDIX D — RELEVANT RULES AND STATUTES

Federal Rules of Civil Procedure, Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions, Rule B

Rule B. In Personam Actions: Attachment and Garnishment

(1) When Available; Complaint, Affidavit, Judicial Authorization, and Process. In an in personam action:

(a) If a defendant is not found within the district when a verified complaint praying for attachment and the affidavit required by Rule B(1)(b) are filed, a verified complaint may contain a prayer for process to attach the defendant's tangible or intangible personal property—up to the amount sued for—in the hands of garnishees named in the process.

(b) The plaintiff or the plaintiff's attorney must sign and file with the complaint an affidavit stating that, to the affiant's knowledge, or on information and belief, the defendant cannot be found within the district. The court must review the complaint and affidavit and, if the conditions of this Rule B appear to exist, enter an order so stating and authorizing process of attachment and garnishment. The clerk may issue supplemental process enforcing the court's order upon application without further court order.

(c) If the plaintiff or the plaintiff's attorney certifies that exigent circumstances make court review impracticable, the clerk must issue the summons and process of attachment and garnishment. The plaintiff has the burden in any post-attachment hearing under Rule E(4)(f) to show that exigent circumstances existed.

(d)(i) If the property is a vessel or tangible property on board a vessel, the summons, process, and any supplemental process must be delivered to the marshal for service.

(ii) If the property is other tangible or intangible property, the summons, process, and any supplemental process must be delivered to a person or organization authorized to serve it, who may be (A) a marshal; (B) someone under contract with the United States; (C) someone specially appointed by the court for that purpose; or, (D) in an action brought by the United States, any officer or employee of the United States.

(e) The plaintiff may invoke state-law remedies under Rule 64 for seizure of person or property for the purpose of securing satisfaction of the judgment.

Appendix D

N.Y. U.C.C. § 4A-502(4) provides:

> Creditor process with respect to a payment by the originator to the beneficiary pursuant to a funds transfer may be served only on the beneficiary's bank with respect to the debt owed by that bank to the beneficiary. Any other bank served with the creditor process is not obliged to act with respect to the process.

N.Y. U.C.C. § 4A-503 provides:

> For proper cause and in compliance with applicable law, a court may restrain (i) a person from issuing a payment order to initiate a funds transfer, (ii) an originator's bank from executing the payment order of the originator, or (iii) the beneficiary's bank from releasing funds to the beneficiary or the beneficiary from withdrawing the funds. A court may not otherwise restrain a person from issuing a payment order, paying or receiving payment of a payment order, or otherwise acting with respect to a funds transfer.

N.Y. U.C.C. § 4A-503.

(3) (3)

No. 09-579, 09-580

Supreme Court, U.S.
FILED
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In The
Supreme Court of the United States

SHELDON PETERS WOLFCHILD, et al.,

Petitioners,

v.

UNITED STATES,

Respondent.

HARLEY D. ZEPHIER, SENIOR, et al.,

Petitioners,

v.

UNITED STATES,

Respondent.

On Petitions For Writs Of Certiorari To The United States Court Of Appeals For The Federal Circuit

BRIEF OF *AMICUS CURIAE* OGLALA SIOUX TRIBE IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

The interest of the Oglala Sioux Tribe ("the OST") in this litigation stems from the fact that approximately 2,000 members of the Tribe are also members of the plaintiff class of lineal descendants of the 1886 Mdewakantons, commonly known as the loyal Sioux (or the loyal Mdewakantons), in *Wolfchild v. United States*, 559 F.3d 1228 (Fed. Cir. 2009), *rev'd*, 62 Fed. Cl. 521 (2004).

Thus, the Tribe has an interest in promoting the general welfare of these tribal members by having the Court grant the Petitioners' Petition for a Writ of Certiorari in the *Wolfchild* case, reverse the judgment of the Federal Circuit, and hold in accordance with the decision of the Court of Federal Claims that the Federal Government owed a fiduciary obligation to the lineal descendants of the 1886 Mdewakantons by virtue of the three Appropriations Acts of 1888, 1889, and 1890, which directed the expenditure of specified monies by the Secretary of the Interior ("the Secretary") for the benefit of these Indians – as well as their families – who had remained loyal to the

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[1] The parties were notified ten days prior to the due date of this brief of the intention to file. Letters from the parties consenting to the filing of this brief have been filed with the Clerk of this Court in accordance with Supreme Court Rule 37.3(a). No counsel for any of the parties has authored this brief, and no person or entity other than *amicus curiae*, its members or counsel, has made a monetary contribution to the preparation or submission of this brief.

white settlers during the Sioux conflict in Minnesota in 1862. *See* Act of June 29, 1888, ch. 503, 25 Stat. 217, 228-29 ($ 20,000); Act of Mar. 2, 1889, ch. 412, 25 Stat. 980, 992-93 ($ 12,000); Act of Aug. 19, 1890, ch. 807, 26 Stat. 336, 349 ($ 8,000). The Federal Government breached this fiduciary obligation, thus making the Federal Government liable in money damages for breach of trust to the *Wolfchild* plaintiffs, including those plaintiffs who are also members of the OST.

The OST wishes to emphasize that it is taking no position on the efforts of the *Wolfchild* plaintiffs to seek relief other than money damages for breach of trust from the Federal Government under the Indian Tucker Act. However, the OST does not endorse the efforts of the *Wolfchild* plaintiffs to claim or take reservation and/or trust land from either the Shakopee Mdewakanton Sioux Community, the Prairie Island Indian Community or the Lower Sioux Indian Community, or to claim or take "income, profits and proceeds from all [of these tribes'] reservation businesses," including "casino profits."

SUMMARY OF THE ARGUMENT

Aside from the conflict in the circuits that has been highlighted by the *Wolfchild* Petitioners, review should be granted because the Federal Circuit decided an important federal question concerning the creation of trust relationships in favor of groups of Indians in a way that conflicts with the fundamental

principles of law laid down by this Court in *United States v. Mitchell*, 463 U.S. 206 (1983) [*Mitchell II*] and *United States v. White Mountain Apache*, 537 U.S. 465 (2003). The Federal Circuit gave undue emphasis to the fact that the Appropriations Acts do not contain the word "trust", as well as to the context and legislative history of those Acts, even though the Acts presumptively created a trust by giving the Secretary, as trustee, control and supervision over the appropriated monies and the property purchased with those monies (the trust corpus) and by adequately defining a class of beneficiaries, namely the loyal 1886 Mdewakantons and their lineal descendants.

The Court should also grant the Petition for a Writ of Certiorari in order to address and decide an important question of federal law regarding whether Congress, in order to terminate a trust in favor of Indians, must use clear and explicit or plain and unambiguous language, especially since the Federal Circuit's decision of this question is in conflict with an earlier decision of the First Circuit.

ARGUMENT

I. Review By This Court Should Be Granted To Correct The Federal Circuit's Decision Of An Important Federal Question Regarding The Creation Of Trust Relationships In Favor Of Indians, As That Decision Conflicts With The Relevant Decisions Of This Court, Namely *Mitchell II* And *White Mountain Apache*.

The *Wolfchild* petitioners argue at length that their Petition for a Writ of Certiorari should be granted because the Federal Circuit's decision in *Wolfchild* conflicts with the Eighth Circuit's decision in *Smith v. Babbitt*, 100 F.3d 556 (1996), *cert. denied sub nom. Feezor v. Babbitt*, 522 U.S. 807 (1997). *See* U.S. Sup. Ct. Rule 10(a). Aside from the need to resolve this conflict in the circuits, the OST, as *amicus curiae*, urges that the Petition should also be granted because the Federal Circuit decided an important question of federal law in a way that conflicts with the relevant decisions of this Court. *See* U.S. Sup. Ct. Rule 10(c).

First, this Court has held that "a fiduciary relationship necessarily arises when the Government assumes . . . elaborate control over . . . property belonging to Indians." *United States v. Mitchell*, 463 U.S. 206, 225 (1983) [*Mitchell II*]. In such cases, "[a]ll of the necessary elements of a common-law trust are present: a trustee (the United States), a beneficiary (the Indian allottees [or, as in this case, the loyal Mdewakanton Sioux and their lineal descendants,])

and a trust corpus (Indian timber, lands and money [or, as in this case, property, improvements to property, and money])." *Id.* Moreover,

> "[(w)here] the Federal Government takes on or has control or supervision over tribal [or Indian] monies or properties, *the fiduciary relationship normally exists* with respect to such monies or properties (unless Congress has provided otherwise) *even though nothing is said expressly* in the authorizing or underlying statute (or other fundamental document) *about a trust fund, or a trust or fiduciary connection.*"

Mitchell II, 463 U.S. at 225 (emphasis added), quoting *Navajo Tribe of Indians v. United States*, 224 Ct. Cl. 171, 183, 624 F.2d 981, 987 (1980).

In other words, the Court in *Mitchell II* recognized that the Federal Government's control or supervision of tribal or Indian properties is ordinarily sufficient to create a trust. *See White Mountain Apache Tribe v. United States*, 249 F.3d 1364, 1375 (Fed. Cir. 2001) ("[T]he language of *Mitchell II* makes quite clear that control alone is sufficient to create a fiduciary relationship."), *aff'd*, 537 U.S. 465 (2003). The *Mitchell II* rule operates as a presumption that in such circumstances a fiduciary relationship exists despite the absence of an express mention of the word "trust". *See, e.g., Cobell v. Norton*, 240 F.3d 1081, 1098 (D.C. Cir. 2001) ("This rules operates as a presumption. . . . Therefore, courts correctly recognize a

trust relationship even where it is not specifically laid out by statute.") (citations omitted).

This presumption has been applied by the Federal Circuit in previous cases to recognize a trust obligation even where a statute did not mention the word "trust". *See, e.g., LeBeau v. United States*, 474 F.3d 1334, 1341 n. 5 (Fed. Cir.) (relying on *Mitchell II* in support of holding that terms of 1972 Distribution Act created a trust responsibility because the United States retained control over tribal monies while the tribes were preparing their rolls subject to the Secretary of the Interior's approval, and while the Secretary was preparing the roll of lineal descendants), *cert. denied*, 551 U.S. 1146 (2007). It has likewise been applied by the Federal Circuit to recognize fiduciary obligations to individual Indian allottees going beyond the limited or bare trust recognized by the Court in *Mitchell I*[2] under the General Allotment Act. *See Brown v. United States*, 86 F.3d 1554, 1560 (Fed. Cir. 1996) ("Under *Mitchell II* then, as properly (and literally construed) the assumption by Congress and/or the Secretary, its delegatee, of control of allottee money or property beyond the limited trust embodied in the General Allotment Act imposes on the government a fiduciary duty to the allottees.").

The Federal Circuit's decision in *Wolfchild*, however, improperly turns the *Mitchell II* presumption on its head. The Federal Circuit reasoned that,

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[2] *United States v. Mitchell*, 445 U.S. 535 (1980) [*Mitchell I*].

"[w]hile it is true that a statute need not contain the word 'trust' in order to create a trust relationship, *the failure to use that term gives rise to doubt that a trust relationship was intended.*" *Wolfchild*, 559 F.3d at 1238 (emphasis added and citations omitted). In other words, the Federal Circuit appeared to presume that a trust relationship was not intended absent an express mention of the term "trust," even though the Federal Government clearly had both control and supervision of the monies appropriated by Congress for the benefit of the 1886 Mdewakantons and their lineal descendants, and of the property purchased by the Secretary with such monies. Accordingly, the Federal Circuit gave great weight to the fact that the Appropriations Acts, instead of using the term "trust", contained "simple" or "minimal" statutory directives, which the appeals court reasoned were insufficient to "properly manifest" an intention on the part of Congress to create a trust relationship. *See id.*, quoting *Restatement (Third) of Trusts* § 13 (2003).

Thus, the reasoning of the Federal Circuit in this case is totally at odds with this Court's opinion in *Mitchell II*. Furthermore, its presumption that it is doubtful that a trust relationship is created absent the use of the term "trust" in the statute or regulation under review is not supported by the authorities cited by the appeals court. The Cohen treatise[3] actually

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[3] *See Cohen's Handbook of Federal Indian Law* § 5.05[1][b], at 429-30 (Nell Jessup Newton et al., eds., 2005) ("[W]hile the presence of the word 'trust' in a statute by itself is neither

(Continued on following page)

confirms the rule of *Mitchell II* that the use of the word "trust" in a statute is not "necessary" to create a compensable claim for breach of trust. As for the passages quoted from Justice Ginsburg's concurring opinion in *United States v. White Mountain Apache*, 537 U.S. 465, 480-481 (2003), Justice Ginsburg nowhere stated or indicated that the absence of the term "trust" from a statute automatically makes it doubtful that the statute creates a trust relationship. Rather, in discussing the Court's holding in the companion case of *United States v. Navajo Nation*, 537 U.S. 488 (2003), in which she wrote the opinion for the Court, Justice Ginsburg observed that the Indian Mineral Leasing Act of 1938 ("IMLA") and its implementing regulations, at issue in *Navajo Nation*, "lacked the characteristics that typify a genuine trust relationship: Those provisions assigned the Secretary of the Interior no managerial role over coal leasing; they did not even establish the 'limited trust relationship' that existed under the law at issue in *Mitchell I*." *White Mountain Apache*, 537 U.S. at 480-481.

By contrast, the Appropriations Acts specifically gave the Secretary discretionary control and supervision over the expenditure of the funds appropriated by Congress, and by implication, over the use and

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necessary nor sufficient to create a compensable claim, statutory or regulatory language using terms normally associated with trust or fiduciary law will be given great weight in the analysis."), cited at *Wolfchild*, 559 F.3d at 1238.

occupancy of the land and other property purchased with those funds, for the benefit of the loyal Mdewakantons and their families, *see, e.g.*, 1890 Act, 26 Stat. at 349 (" . . . to be expended by the Secretary of the Interior as in his judgment he may think best, for such lands, agricultural implements, buildings, seeds, cattle, horses, food, or clothing as may be deemed best in the case of each of these Indians or families thereof"), and further directed the Secretary that the appropriated funds should be "so expended that each of the Indians in this paragraph mentioned shall receive, as nearly as practicable, an equal amount in value of this appropriation." *See* 1889 and 1890 Acts, 25 Stat. at 992-93; 26 Stat. at 349. Thus, unlike the IMLA in *Navajo Nation*, the Appropriations Acts clearly gave the Secretary a comprehensive "managerial role" over the appropriated monies and the property purchased with those monies.

Moreover, this Court in *Mitchell II* made it clear that its construction of the statutes and regulations at issue in that case as having created a trust and fiduciary obligation on the part of the Government was "reinforced by the undisputed existence of a general trust relationship between the United States and the Indian people." *Mitchell II*, 463 U.S. at 225. The Court recognized that it had "previously emphasized 'the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people.'" *Id.*, quoting *Seminole Nation v. United States*, 316 U.S. 286, 296 (1942).

By contrast, while recognizing that "[c]onsistent with the principle that there is a 'general trust relationship between the United States and the Indian people,' [quoting *Mitchell II*, 463 U.S. at 225], Interior Department officials often characterized the 1886 lands as being held in trust for the 1886 Mdewakantons and their descendants," *Wolfchild*, 559 F.3d at 1248, the Federal Circuit ruled that the "general trust relationship" principle did not apply to the instant case because the 1886 Mdewakantons and their descendants were not a tribe of Indians. *See id.* ("[T]he 1886 Mdewakantons were not a tribe of Indians, but rather were viewed as a group of individuals who had severed their tribal relations and were in need of assistance."). The "general trust relationship" principle, however, applies to all "the Indian people," *Mitchell II*, 463 U.S. at 225, including individual Indians, not just tribes, and would certainly extend to the 1886 Mdewakantons and their descendants. Again, the Federal Circuit's refusal to recognize the applicability of the "general trust relationship" principle to all Indians, not just tribes, conflicts with *Mitchell II*.

The Federal Circuit's decision also conflicts with this Court's pronouncement in *White Mountain Apache* that "[w]here as in *Mitchell II*, 463 U.S. 206, 225 . . . (1983), the relevant sources of substantive law create 'all of the necessary elements of a common-law trust,' there is no need to look elsewhere for the source of a trust relationship." *White Mountain Apache*, 537 U.S. at 475 n. 3. The Court of Federal

Claims, after quoting this passage from *White Mountain Apache*, determined that "[t]he 1888, 1889, and 1890 Acts in combination have [the] three key features [of a common-law trust] that show the creation of a trust." *Wolfchild*, 62 Fed. Cl. at 540-541. First, the language of the Appropriation Acts "functionally appoints the Secretary of Interior to serve as the trustee to spend the funds on behalf of the beneficiaries, the loyal Mdewakanton." *Id.* at 541. Secondly, the Appropriations Acts designated the loyal Mdewakanton and their families (which the Secretary interpreted as including lineal descendants) as the beneficiaries of the trust. *See id.* at 541-542. Third, the Appropriations Acts created a trust corpus that included property, improvements to property, and monies. *Id.* at 541.

In reversing the Court of Federal Claims, the Federal Circuit did not follow the approach of *White Mountain Apache* in addressing whether the three fundamental elements of a common law trust were present. Instead, the appeals court focused on (1) the absence of any express use of the term "trust" in the Appropriations Acts themselves, *Wolfchild*, 559 F.3d at 1238; (2) the fact that each of the Appropriations Acts "was enacted as part of a much longer statute that contained appropriations for payment of the expenses of the Indian Department and for the support of certain Indian tribes . . . [which] contained no language suggestive of a trust relationship," *id.* at 1238-1239; and (3) the fact that "nothing in the legislative history of the three provisions at issue in this case

indicates that they were designed to create a trust relationship." *Id.* at 1240.

As already pointed out above, the Federal Circuit's reliance on the absence of the use of the term "trust" conflicts with this Court's decision in *Mitchell II*. As for the appearance of each of the three Appropriations Acts in "much longer" appropriations statutes and the lack of any legislative history that the Mdewakanton appropriations were designed to create a trust relationship, these matters are irrelevant under the approach outlined in *White Mountain Apache*. Since (as the Court of Federal Claims correctly determined) the "relevant sources of substantive law," namely the three Appropriations Acts themselves, "create all of the necessary elements for a common-law trust," namely a trustee, a class of beneficiaries, and a trust corpus, "there [was] no need [for the Federal Circuit] to look elsewhere[, such as context or legislative history,] for the source of a trust relationship." *See White Mountain Apache*, 537 U.S. at 475 n. 3.

In sum, the OST respectfully urges the Court to grant the *Wolfchild* Petitioners' Petition for a Writ of Certiorari, not only to resolve the conflict in the circuits pointed out by the Petitioners, but also to correct the Federal Circuit's serious deviation from the principles laid down by this Court in *Mitchell II* and *White Mountain Apache* in deciding an important question of federal law, by holding that the Appropriations Acts created a trust in favor of the loyal Mdewakantons and their lineal descendants.

II. Review Should Be Granted To Decide Whether A Trust In Favor Of Indians Can Be Terminated By Congress Without Either Express Or "Plain And Unambiguous" Language, Since The Federal Circuit's Decision Created A Conflict In The Circuits On This Question.

The OST also urges the Court to grant the *Wolfchild* Petition for a Writ of Certiorari in order to decide an important question of federal law, namely whether a trust whose beneficiaries are Indians can be terminated by Congress without either express or "plain and unambiguous" language to that effect, or the consent of the beneficiaries. In ruling that the 1980 Act, *see* Pub. L. No. 96-557, 94 Stat. 3262 (1980), did not terminate the trust in favor of the loyal 1886 Mdewakantons and their lineal descendants, the Court of Federal Claims pointed out that, while Congress "typically" uses explicit language in terminating trusts in favor of Indians, "the 1980 Act does not state as its purpose that the trust for the Mdewakanton would be terminated." *Wolfchild*, 62 Fed. Cl. at 543. The Federal Claims Court further pointed out that, while the consent of the beneficiaries is generally required in order to terminate a trust, such consent "was not received here." *Id.*, citing *Restatement (Third) of Trusts* § 65(1) (2003).

On appeal, the Federal Circuit nevertheless reversed the Court of Claims on this question also, concluding that "Congress's failure to include express language of trust termination [in the 1980 Act]

cannot be regarded as indicative of an intention not to alter the previous legal relationship among the parties." 559 F.3d at 1258 (footnote omitted).

This Court has long held that in determining congressional intent, the federal courts follow "the general rule that '[d]oubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith.'" *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 174 (1973), *quoting Carpenter v. Shaw*, 280 U.S. 363, 367 (1930); *accord*, *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 586 (1977). The Court has applied this rule of construction to hold, with respect to the termination of Indian reservations, that the federal courts will not lightly conclude that a reservation has been terminated and will require a clear indication of that fact. *DeCoteau v. District County Court for Tenth Judicial District*, 420 U.S. 425, 444 (1974); *see also South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998) ("[O]nly Congress can alter the terms of an Indian treaty by diminishing a reservation . . . , and its intent to do so must be 'clear and plain.'") (citations omitted); *Solem v. Bartlett*, 465 U.S. 463, 470 (1984) (Congress must clearly evince an intent to change boundaries before diminishment will be found).

The Federal Circuit failed to adhere to this rule of construction in holding that the 1980 Act terminated the trust in favor of the loyal 1886 Mdewakantons and their lineal ancestors, despite the

absence of clear and express language to that effect or the consent of the beneficiaries.

The Federal Circuit's decision also conflicts with the decision of the First Circuit Court of Appeals in *Joint Tribal Council of the Passmaquoddy Tribe v. Morton*, 528 F.2d 370 (1st Cir. 1975), that "any withdrawal of trust obligations by Congress" would have to be made in "plain and unambiguous" language in order to be effective. 528 F.2d at 380. In so holding, the First Circuit analogized to this Court's holding in *DeCoteau* regarding the termination of Indian reservations. *Id.* at 380 n. 12.

The Court should therefore also grant the *Wolfchild* Petitioners' Petition for a Writ of Certiorari in order to resolve this conflict in the circuits and decide the important question of federal law, never before addressed by this Court, as to the need for clear and explicit or "plain and unambiguous" language in congressional enactments that purport to terminate a trust in favor of Indians, absent the consent of the beneficiaries of the trust.

CONCLUSION

For the reasons set forth above and in Petitioners' Petition for a Writ of Certiorari, this Court should grant the Petition for a Writ of Certiorari requested in this case.

Respectfully submitted,

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